

88-18



Supreme Court, U.S.

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No. 88-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CITY OF NEW HAVEN, CONNECTICUT,
Petitioner,

v.

JOHN O. MARSH, JR., SECRETARY OF
THE ARMY, *et al.*
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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QUESTIONS PRESENTED

This suit for declaratory and injunctive relief was brought by respondent, Mall Properties, Inc., against respondents, Secretary of the Army and officials of the United States Army Corps of Engineers, to challenge the denial of a permit to fill waters of the United States, in order to construct a regional shopping mall, under section 404 of the Clean Water Act, section 10 of the Rivers and Harbors Act and section 102(2)(C) of the National Environmental Policy Act. Following two years of review, the District Court granted summary judgment for respondent, Mall Properties, Inc., on the merits, vacated the Corps' denial decision as being contrary to law, enjoined the Corps on remand from engaging in

previously accepted, long-standing regulatory practice (the consideration of social and economic, as well as environmental effects of the project) and did not retain jurisdiction. Petitioner, City of New Haven, which had successfully sought permit denial before the Corps and was granted intervention under Rule 24(a) of the Federal Rules of Civil Procedure by the District Court, appealed. The First Circuit Court of Appeals dismissed the appeal because the District Court remand order was not a final judgment. The Court of Appeals further held that New Haven could not appeal because the respondent, Secretary of the Army, chose not to appeal.

The questions presented are:

1. Whether, under the Administrative Procedure Act and 28 U.S.C.

§ 1291, a District Court decision granting summary judgment on the merits, vacating an agency decision based on a new legal standard and enjoining previously accepted, long-standing federal agency practice on remand is not a "final decision" because the District Court did not yet grant the respondent, Mall Properties, Inc., ultimately what it wanted (i.e., a fill permit to construct a regional shopping mall).

2. Whether 28 U.S.C. § 1291 forbids a successful party before a federal agency and one granted intervention under Rule 24(a) of the Federal Rules of Civil Procedure, from appealing an adverse District Court decision because the federal agency chooses not to appeal.

PARTIES TO THE PROCEEDINGS

The petitioner is the City of New Haven, Connecticut. The respondents are John O. Marsh, Jr., Secretary of the Army, Lt. General E. R. Heiberg, Chief of the United States Army Corps of Engineers, Col. Thomas A. Rhen, Division Engineer, New England Division and the United States Army Corps of Engineers, Department of the Army. The respondents also include Mall Properties, Inc., a corporation organized under the laws of the State of New York that maintains its principal office in the City and County of New York.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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The City of New Haven, Connecticut respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B)^{1/} is reported at 841 F.2d 440 (1st Cir. 1988). The denial of the petition for rehearing and suggestion for rehearing en banc (App. A) is unreported at this time. No. 87-1827, slip op. (1st Cir. April 7, 1988). The memorandum and order of the District Court (App. D) is reported at 672 F. Supp. 561 (D. Mass. 1987).

JURISDICTION

The judgment of the Court of Appeals (App. B) was entered on March 11, 1988. The petition for rehearing and suggestion for rehearing en banc (App. A)

^{1/} The opinions below and other relevant materials are bound in a separate Appendix, hereinafter referred to as "App. ____."

was denied on April 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL, STATUTORY AND
REGULATORY PROVISIONS INVOLVED**

This case involves issues under 28 U.S.C. § 1291 (Add. at 5a)^{2/}; relevant provisions of the Clean Water Act, 33 U.S.C. § 1344 (Add. at 4a-5a); the Rivers and Harbors Act, 33 U.S.C. § 403 (Add. at 3a-4a); the National Environmental Policy Act, 42 U.S.C. §§ 4321, 4331(b) & 4332(2)(C) (Add. at 1a-3a); the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (Add. at 5a); regulations of the United States Army Corps of Engineers, 33 C.F.R. § 320.4(a) & (q) (Add. at 6a-8a); regulations of the Council on

^{2/} The texts of all cited statutes and regulations are set forth in the Addendum to this Petition, hereinafter referred to as "Add. at ____."

Environmental Quality, 40 C.F.R. §§
1502.16, 1508.7, 1508.8(a), (b), &
1502.14 (Add. at 8a-11a).

STATEMENT

1. This suit for declaratory and injunctive relief was filed by respondent, Mall Properties, Inc., in the United States District Court for the District of Massachusetts on October 29, 1985 against the respondent, Secretary of the Army and various officials of the United States Army Corps of Engineers ("U.S. ACOE" or "Corps"), under section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, section 10 of the Rivers and Harbors Act ("RHA"), 33 U.S.C. § 403 and section 102(2)(C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C). Mall Properties, Inc. challenged the final decision of the

New England Division of the U.S. ACOE denying its application for a permit to deposit one million cubic yards of fill onto the floodplains and wetlands of the Quinnipiac River in North Haven, Connecticut in order to construct a 1.2 million square foot regional shopping mall. The primary basis for its challenge was that the U.S. ACOE was without statutory authority to consider, as part of its permit denial decision, the adverse social, economic and racial effects of the proposed mall on the region, particularly the City of New Haven.

2.a. The City of New Haven is one of the nation's oldest (founded in 1638) and poorest municipalities (7th in the United States according to the 1980 census; 23% of its residents are below the poverty level). It is immediately

adjacent to North Haven and is the largest municipality within the 10-town region that would be served by the proposed mall. Moreover, the proposed mall is less than 8 miles from New Haven's central business district, easily accessible by numerous roadways from various locations throughout the region (including New Haven) and situated on the Quinnipiac River, which flows downstream through New Haven and into its Harbor. The Quinnipiac River has historically been a source of serious flooding problems.

b. The proposed North Haven Mall would generate 55,000 motor vehicle trips per day, 500 to 3,077 tons of solid waste per year, and require the filling of more than 30 acres of wetlands and open water. Final Environmental Impact Statement ("EIS") at IV-10, IV-22,

IV-21. With specific reference to the City of New Haven, the proposed mall would result in the estimated loss of 600 jobs, more than one million dollars a year in tax revenues (1982 dollars), approximately 20 percent of its retail sales, one or more major department stores and other ancillary, adverse social, economic and racial effects. Final EIS, IV-31-34, IV-29.

3. The City of New Haven actively opposed the respondents' application before the U.S. ACOE on environmental (i.e., flooding, wetlands loss), social and economic grounds, including the adverse aesthetic and racial stratification impact it will have on the region. New Haven was granted intervention as of right under Federal Rule of Civil Procedure 24(a) in the District

Court. App. E. The District Court
stated:

The court finds that the City of New Haven has met the requirements for intervention of right. The City of New Haven seeks to intervene under Rule 24 primarily to protect the economic interests the Corps allegedly relied upon in denying the permit. Therefore, unlike the environmental groups, the City of New Haven is directly interested in the "economics" question which plaintiff has raised by this action. An adverse ruling by the court on this issue would limit the City's ability to protect its interests on remand.

Plaintiff [Mall Properties, Inc.] argues that the Corps adequately represents the City's interests in this action. The City replies that the government may not represent its interests adequately, arguing that the government has a duty to protect the public interest, while the City seeks to protect its unique interests. The City has also outlined the history of disagreements between

the Corps and the City which have arisen during the permit litigation before the Corps. The court also notes that the Corps does not object to the City's intervention in this case.

App. E at 90a-92a. The District Court denied the motion of national and local (Connecticut and North Haven-based) environmental and citizens groups to intervene (*id.* at 92a), despite the participation of most such groups in the administrative proceeding below. No appeal was taken from the District Court's ruling.

4. The U.S. ACOE, following six years of review and the preparation of an Environmental Impact Statement ("EIS") under the National Environmental Policy Act (42 U.S.C. § 4332(2)(C)), denied respondent Mall Properties' application in a "proposed Final Order"

of November 15, 1984 (App. F) and a "Final Order" of August 20, 1985 (App. H).^{3/} The August 1985 denial was based

^{3/} In November 1984, the New England Division Engineer affixed his signature to a 45-page "Record of Decision" ("ROD")(App. F) denying respondents' application for a fill permit because of: (i) the "cumulative impact from other past, present and reasonably foreseeable future actions affecting wetlands, flood plains and flooding"; (ii) the "irretrievable loss of 25 acres of wetlands"; (iii) "negative impacts on the quality of life in North Haven"; and (iv) adverse "socio-economic impacts, in particular, those affecting the City of New Haven." *Id.* at 98a. The factual basis for this last reason for permit denial was, inter alia, that:

New Haven provides services and an environment for a community with a sizeable low to moderate income population. This population is less able to travel to reach services at other locations. It is more dependent upon a vibrant, viable city to provide services and a healthy, safe and desirable environment.

FOOTNOTE CONTINUED

on three grounds: (i) "a net loss in wetland resources" (App. H at 270a); (ii) "flooding impacts" (id. at 270a); and (iii) ~~the~~ "socio-economic impacts this project would have on the City of New Haven" (id. at 270a).

Before the Corps, and during the District Court proceeding, the Department

FOOTNOTE 3/ CONTINUED:

Id. at 98a. This November 1984 ROD was not made public. A copy was made available only to the respondent, Mall Properties, Inc. The fact of its existence was not made known to New Haven until June 1985. Neither the November 1984 ROD nor the August 1985 ROD are designated as "proposed" or "final" -- terminology used only by the District Court.

It is New Haven's position, supported explicitly by the New England Division Engineer, that the August 1985 ROD is premised expressly on and can only be understood in reference to the November 1984 ROD. See App. H at 155a.

of Interior supported the Corps' concerns about wetlands. App. H at 132a. Furthermore, the Department of Housing and Urban Development and the Governor's Office of Policy and Management supported the Corps' concerns about adverse social, economic and racial impacts (id. at 139a) and the Federal Emergency Management Agency supported the Corps' concerns about flooding (id. at 142a). All such supporting comments were submitted to the Corps as part of the EIS process, considered by it pursuant to NEPA and in accordance with its "Public Interest Review" regulation (33 C.F.R. § 320.4)(which requires consideration of "economics" and "the needs and welfare of the people," promulgated pursuant to, inter alia, NEPA, CWA and the RHA (Add. 6a-8a)), and

identified in its August 1985 ROD. App. H at 266a.

5.a. The District Court, on cross-motions for summary judgment filed by all the parties, vacated the U.S. ACOE decision on September 8, 1987. Mall Properties, Inc. v. Marsh, 672 F. Supp. 561 (D. Mass. 1987). App. D. It determined that the permit denial decision, based on the Corps' Public Interest Review regulations (33 C.F.R. § 320.4), NEPA, the CWA and the RHA, "was not made in accordance with law" because, inter alia, "the Corps exceeded its authority . . . by basing its denial of the permit on socio-economic harms [to the region and the City of New Haven] that are not proximately related to changes in the physical environment," caused by the fill. App. D at 26a (emphasis added)(relying on

the "standard" set forth in Metropolitan Edison Co. v. People Against Nuclear Energy (PANE), 460 U.S. 766 (1983)). Contrary to the position of the Petitioner and the U.S. ACOE that, under the Council on Environmental Quality's (CEQ) and U.S. ACOE's regulations, such economic and social impacts must be considered because they are "reasonably foreseeable," (40 C.F.R. §§ 1508.8(b), 1508.7) indirect effects of a regional mall on the region, the District Court stated: "The record reveals that these impacts would not result from any effect the mall would have on the physical environment generally or wetlands particularly. Rather, it is the economic competition for New Haven which would result from the mere existence of a mall anywhere in North Haven . . . [even though the] Corps

did find that there was no alternative site for the mall in North Haven." App. D at 36a.^{4/}

Moreover, although Metropolitan Edison involved only the threshold question of whether an EIS was required in light of alleged psychological harm from the restart of an already existing facility (see 460 U.S. at 768), the District Court here (i) concluded the "proximately related" standard applied to all NEPA questions (including, for the first time, which impacts should be addressed following a determination to prepare an EIS for a new project); and (ii) determined that the reasoning of "pre-Metropolitan Edison

^{4/} The District Court incorrectly stated that "North Haven is a suburb about 10 miles from New Haven, Connecticut." App. D at 26a-27a. As stated at the outset, New Haven and North Haven are adjacent to each other.

NEPA cases," including those from the 5th, 6th, 7th and 2nd Circuits concerning whether reasonably foreseeable social and economic impacts had to be considered in an EIS that was premised on recognized environmental harm, have been "eliminated by Metropolitan Edison." App. D at 70a.

b. The District Court also stated that it "is elementary . . . that in our system of government, decisions concerning which competing constituency's economic interests ought to be preferred are traditionally made by democratically accountable officials," (App. D at 75a), such as the Governor of Connecticut but not the U.S. ACOE; and that, in the legislative history of the statutes involved here, there "is no suggestion that

[the Corps] was perceived by those enacting the relevant statutes to have expertise concerning whether the economic interests of aging cities or their newer suburbs should as a matter of public policy be preferred." App. D at 75a.^{5/}

Finally, the District Court, relying on the First Circuit's decision in Faulkner Hospital Corp. v. Schweicker, 537 F. Supp. at 1071 (D. Mass. 1982), aff'd, 702 F.2d 22 (1st Cir. 1983), vacated the U.S. ACOE decision, enjoined it from any further consideration of the mall's social, economic or racial impacts on the region, including New Haven, and

^{5/} It should be noted that New Haven and North Haven were founded in the 17th and 18th Centuries, respectively. Connecticut Blue Book (1987 ed.).

remanded "for further proceedings consistent with this decision." App. D at 84a.^{6/}

The District Court did not retain jurisdiction. Additionally, throughout the District Court proceeding, the Justice Department -- on behalf of the Corps -- supported the August 1985 permit denial decision. Moreover, no questions were raised about the adequacy of the evidence before the District Court or the need for the Court to postpone its

^{6/} In its Complaint, respondent Mall Properties, Inc., sought a judgment "directing ACOE to issue Mall Properties the subject permits" (Complaint ¶ 3b). At the suggestion of the District Court, respondent recognized that such relief was not available to it, and that, under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and other jurisprudential considerations, the appropriate judicial remedy was a remand to the U.S. ACOE for further proceedings.

decision on the merits of the issues, pending some further factual development or the resolution of a legal issue by the U.S. ACOE.

6.a. The City of New Haven appealed on September 14, 1987. On November 19, 1987 -- after the expiration of the appeal period -- the Justice Department informed the Court of Appeals, without explanation, that it had determined not to appeal and that New Haven's appeal should be dismissed. No reasoning, case citations, subsequent brief, memoranda or affidavit was ever filed by the Justice Department to support its motion, nor did the Court order it to do so, despite Petitioner's formal request. On December 2, 1987, respondent Mall Properties stated that it was joining the Government's motion to dismiss.

b. On March 11, 1988, a panel

of the Court of Appeals granted, without oral argument, the U.S. ACOE's motion to dismiss, concluding the "remand order" of the District Court is "not a final judgment" and, therefore, not appealable under 28 U.S.C. § 1291. App. B at 5a.

Focusing on Mall Properties' ultimate objective, (i.e., to have the Corps grant the permit to build a regional mall) as being the controlling criterion determining "finality," the Court of Appeals concluded that because "the District Court's remand order does not grant Mall ultimately what Mall wants," the "court's order is but one interim step in the process toward Mall's obtaining its ultimate goal." "The litigation," the Court stated, "has not ended." App. B at 8a.

Moreover, although the Court of Appeals stated that "generally orders

remanding to an administrative agency are not final, immediately appealable orders," (*id.* at 10a)(citing Pauls v. Secretary of Air Force, 457 F.2d 294 (1st Cir. 1972)), it also characterized other cases where appeals were allowed as "exceptions," to this general rule, such as United States v. Alcon Laboratories, 636 F.2d 876 (1st Cir.), cert. denied, 451 U.S. 1017 (1981). The Court, recognizing that in one such "exception" -- Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984) -- the government was allowed to appeal from a substantive decision on the merits that required a remand, nonetheless concluded that because the U.S. ACOE did not appeal here, Bender had no application to New Haven. App. B at 16a-18a.

The Court of Appeals also concluded that New Haven "has not been foreclosed from participating in the proceedings on remand" because "[p]resumably, it

can urge environmental reasons why the permits should be denied" (*id.* at 18a), and, after review by the Corps and a subsequent District Court decision, New Haven can "appeal to this Court and . . . argue that the original permit denial . . . was proper" *Id.* at 18a. Thus, "review of the socio-economic issue the City now wants to present, is not denied; it is simply delayed." *Id.* at 18a-19a.

Finally, the Court concluded that allowing the appeal "would violate . . . efficiency" *Id.* at 20a. Although stating that, "were review granted now and were we to conclude the District Court erred, an unnecessary administrative proceeding could be averted [fn. omitted]" (*id.* at 20a-21a), the Court found, relying on Bachowski v. Usery, 545 F.2d 363 (3d Cir. 1976), that

"wisdom" required that "we focus on systemic, as well as particularistic, impacts." Id. at 21a-22a.

7. On March 24, 1988, New Haven filed its Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied by the First Circuit's Order dated April 7, 1988. App. A.

REASONS FOR GRANTING THE PETITION

The decision of the Court of Appeals establishes a pernicious, new rule for determining "finality" in judicial review under the Administrative Procedure Act ("APA") that renders meaningless the efforts of this Court, since at least McGourkey v. Toledo & O.C. Ry., 146 U.S. 536, 544-545 (1892), to provide a modicum of protection to the debilitating effect of delaying justice to an adversely affected party. As a practical matter, the Court of Appeals' opinion

restricts the criteria for determining "finality" to one factor and to the effect on one party: whether the applicant received ultimately what it wanted from a federal agency (in this case, an economically valuable fill permit to construct a mall), regardless of the fact such relief is not judicially available. Under such a standard, the Judicial Branch becomes an advocate for the applicant; assuring, in the end, that the substantive content or the practical effect of a District Court decision will not be meaningfully reviewed until the applicant extracts his alleged economic benefit from the Executive Branch. This Court, as argued below, has never articulated such a fundamentally unfair and constitutionally inappropriate rule. For this reason alone, review by this Court is warranted.

Here, however, much more is at stake. A new, substantive legal standard concerning NEPA, the CWA and the RHA has been articulated by the District Court. It is not trivial. Based on the misapplication of this Court's decision in Metropolitan Edison v. PANE, the District Court "eliminated" more than a decade of judicial precedents from the 2nd, 5th, 7th and 6th Circuits (App. D at 70a); and, it enjoined the U.S. ACOE's long-standing interpretation of its statutory obligations to consider the reasonably foreseeable effects of a project and the "Public Interest," including economic effects and the welfare of the people, in rendering a permit decision. Id. at 26a, 77a, 79a, 83a, 84a. It also has raised troublesome questions about the continued viability of the Council on Environmental

Quality's NEPA regulations defining the "human environment" (40 C.F.R. § 1508.14) and "indirect" (40 C.F.R. § 1508.7) and "cumulative" impacts (40 C.F.R. § 1508.7). See Add. at 11a, 9a. In the end, the District Court impermissibly exceeded its role by failing to accord any deference to the U.S. ACOE's interpretation of the CWA, NEPA and the RHA and the specific effects of this project. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

The District Court's decision remains unreviewed by the Court of Appeals, unreviewable by the U.S. ACOE on remand, and unreviewable by the District Court under the law of the case doctrine. The incongruous effect on New Haven is deadening. We are estopped from challenging it below and precluded from appealing it now. Moreover, as a practical matter, the decision's reasoning is

stifling to any litigant who is dependent on the federal government -- in civil rights, equal employment opportunity or a broad range of environmental cases -- to vindicate an important public and judicially cognizable issue directly affecting such a litigant. Based on an inarticulated philosophy of government or the political discomfort of being on the "wrong side," an agency -- by not appealing -- can thwart the appeal of a party that was a successful proponent before the agency and, in the process, thwart the agency's statutory mission and, in this case, the meritorious reasoning of that agency after six years of study.

The Court of Appeals' decision warrants the timely exercise of this Court's supervision on the question of "finality" and the appeal rights of an intervenor, the petitioner, City of New Haven.

1.a. The Court of Appeals' analysis is flawed in its premise. "We do not view the [District Court] remand order," the Court of Appeals stated, "as meeting the traditional definition of a final judgment, that is, one which 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment,' Catlin v. United States, 324 U.S. 229, 233 (1945)." App. B at 8a. This Court has eschewed such a "traditional definition" as being either the beginning or the end of a proper analysis of whether a decision is "final" under 28 U.S.C. § 1291. The correct analytical premise is that "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." Gillespie v. United States Steel Corp., 379 U.S. 148, 152

(1964)(emphasis added). And, more recently: "We know, of course, that § 1291 does not limit appellate review to 'those final judgments which terminate an action . . . ,' but rather that the requirement of finality is to be given a 'practical rather than a technical construction.'" Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 170-71 (1974)(emphasis added)(quoting Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545 (1949)).

Having started on a faulty premise and inappropriate definition, the Court of Appeals strayed further. Seemingly seeking a simple factual predicate to meet the "traditional definition," it further defied this Court's teachings and elevated a "verbal formula" (Eisen v. Carlisle and Jacquelin, 417 U.S. at 170), from Pauls v. Secretary of Air Force, 457

F.2d at 297-98)("generally orders remanding to an administrative agency are not final, immediately appealable orders"), into a general rule; concluding that the word "remand" in the formulation of the District Court's relief is a talisman for lack of finality. It is not, as the Court of Appeals own case law (Faulkner Hospital Corp. v. Schweicker, 702 F.2d 22 (1st Cir. 1983), cited by the District Court, should have informed it.^{7/} The

^{7/} The Court of Appeals' other citations undermined its own formulation of an alleged "rule" correlating a "remand" to a lack of finality. In each of the cases it cites, a substantive decision on the merits was expressly eschewed as premature (App. B at 8a-11a)(see, e.g., Transportation-Communication Division v. St. Louis-San Francisco Rv., 419 F.2d 933, 934 (8th Cir. 1969), cert. denied, 400 U.S. 818 (1970)), wherein the remands involved were intended to resolve a procedural or evidentiary deficiency, certainly

FOOTNOTE CONTINUED

result: the Court of Appeals focused not on the "practical" (Eisen, 417 U.S. at 170), but rather the "technical construction" of the District Court decision (i.e., whether it was a "remand") and its singular effect on the attainment of the respondent, Mall Properties, Inc.'s ultimate goal (a regional shopping mall).

The effect is a radical, pernicious departure from the practical, cautious approach this Court has admonished lower courts to undertake in determining

FOOTNOTE 7/ CONTINUED:

not the case here. Moreover, the Court of Appeals strained its new "rule" beyond credulity by claiming that Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984) -- where the Court of Appeals concluded an appeal under 28 U.S.C. § 1291 from a decision on the merits was permissible where the District Court had ordered a remand -- is distinguishable from this case only because it was the government, not another defendant, that sought appellate review.

"finality." In the end, the Court of Appeals has taken a rule of limited application (see n. 7, supra), elevated it beyond its purpose and established a general rule of broad application to every case involving a "verbal formula," (Eisen, 417 U.S. at 170), "remand to the agency," contrary to its own customary practice, the rule of the 10th Circuit in Bender v. Clark, 744 F.2d at 1426, and based, inappropriately, on the economic agenda of the respondent, Mall Properties, Inc., vis-a-vis the Executive Branch.

b. The Court of Appeals failed to recognize that the District Court granted summary judgment, under Rule 54 of the Federal Rules of Civil Procedure, on the substantive merits of the single issue all the parties agreed was the fundamental legal linchpin to the U.S. ACOE

permit denial: whether, under the CWA, the RHA, NEPA and the U.S. ACOE "Public Interest Review" regulation, the ACOE had the authority to consider, inter alia, the social and economic effects of the proposed regional mall on the region, particularly New Haven. The District Court by resolving the issue as a matter of law, vacating the agency's decision and enjoining the Corps from any further consideration of such effects, clearly acted in a manner that "was not 'tentative, informal or incomplete' . . . but settled conclusively [respondent Mall Properties, Inc.'s] claim"

Eisen, 417 U.S. at 171 (quoting Cohen, 337 U.S. at 546). It was, in the words of 28 U.S.C. § 1291, a "final decision."

c. This Court has not explicitly articulated a practical construction (see Eisen, 417 U.S. at 170), concerning

"finality" directly applicable to the broad range of APA cases wherein an agency decision is "remanded" for further consideration. The absence of such essential guidance is, once again, a growing lack of harmony (see McGourkey v. Toledo & O.C. Ry., 146 U.S. 536 (1892)), among the Circuits and the formation of a wholly inappropriate and harmful rule within the First Circuit.

2.a. "[T]he danger of denying justice [to New Haven] by delay," (Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)), permeates the Court of Appeals decision. More is at stake, however, than the indefensible consequence of delaying resolution of the issue concerning the U.S. ACOE's authority to consider social and economic effects. New Haven has been denied the most elementary notions of justice. By

"delaying" New Haven's ability to have the issue even considered until it reaches the Court of Appeals again, the decision places petitioner in a very predictable "catch-22"; constantly forced to argue that it has a right to be heard on a legal issue that neither the U.S. ACOE nor the District Court have any duty to consider. Under such circumstances, New Haven's "standing" under Article III to even argue economic or social reasons for permit denial would certainly be challenged. So too would New Haven's standing to argue some "physical environmental" issues as that term is defined by the District Court. Moreover, it could be two more rounds of procedural and jurisdictional (i.e., standing) litigation before the Court of Appeals reaches the merits of the social-economic issue, if ever. The U.S. ACOE could deny the

permit again, on other grounds, and the District Court could affirm the denial.

This, of course, is not the end of the serious impediments the Court of Appeals has created. Its analysis of res judicata and law of the case provides doubtful comfort. Dickinson, 338 U.S. at 511. In order to diminish the risk that the Court of Appeals is incorrect on the issues of "finality," res judicata and law of the case, New Haven is, as a practical matter, precluded from seeking judicial review in any other jurisdiction except Massachusetts even though the District Court below did not retain jurisdiction and petitioner is entitled to file any subsequent challenge to the Corps in Connecticut or the District of Columbia. "This scenario of 'possibilities' is too conjectural to avoid reaching a more just result" (Bender v. Clark,

744 F.2d at 1428), particularly where, as here, the Court of Appeals acknowledged that "were review granted now and were we to conclude the District Court erred, an unnecessary administrative proceeding could be averted." App. B at 21a.

b. By making the attainment of the respondent, Mall Properties, Inc.'s, economic goal the essential focus of its analysis, the Court of Appeals made no meaningful effort to undertake an evaluation of the effect of its decision on the parties. There is no "inconvenience and cost[]," (Eisen, 417 U.S. at 171), to Mall Properties, Inc. in the immediate resolution of the legal issue it has wanted resolved since filing its Complaint in October 1985. There is no discernable harm to the U.S. ACOE; no government project is at stake nor is the filling of wetlands or the construction

of suburban shopping malls a statutory or policy objective. The adverse harm to New Haven and the the administration of the CWA, NEPA and the RHA is clear and immediate.

The City of New Haven has actively opposed the construction of the North Haven Mall since 1980. It took the U.S. ACOE almost six years to render its ROD, 45 pages in length, denying the permit. The litigation has now consumed almost three additional years. For a municipality like New Haven -- the 7th poorest in the United States, according to the 1980 census, for cities over 100,000 -- such an effort has placed a substantial burden on New Haven's taxpayers. Moreover, the resolution of the legal issues in this case are of fundamental importance to the entire metropolitan region.

c. The fundamental flaw in the District Court's reasoning stemmed from its wholly unwarranted intrusion into interpreting the statutory obligations of the U.S. ACOE. Relying on the respondent, Mall Properties, Inc.'s, characterization of the permit denial as being based on economic competition^{8/} rather than social and economic impacts, the District Court decided that: (i) the U.S. ACOE is not "democratically accountable" (App. D at 75a) and cannot make such a "competition" judgment; and, therefore, (ii) the Court "is called upon to discern the scope of the authority to consider economic factors which has been

8/ App. D at 36a. The notion of "economic competition" was nowhere addressed by the U.S. ACOE in its ROD and clearly not reflected in the "Conclusions" reached in its November 1984 or August 1985 ROD's.

FOOTNOTE CONTINUED

delegated to, and exercised by, the Corps." Id. at 42a. Unable to find any direct legislative history under the RHA, CWA or NEPA, that "unambiguously expressed [the] intent of Congress" (Chevron U.S.A., Inc. v. NRDC, 467 U.S. at 843), that the U.S. ACOE was precluded from considering social and economic factors, the District Court grafted onto that history this Court's "proximately related" standard from Metropolitan Edison (id. at 59a-60a), although such a standard is nowhere referred to or cited

FOOTNOTE 8/ CONTINUED:

Moreover, no federal or state agency raised any question about "competition"; all participants before the U.S. ACOE -- HUD, the Department of the Interior/U.S. Fish and Wildlife Service and the Connecticut Office of Policy and Management -- stated that adverse environmental, social, economic or racial impacts warranted permit denial.

in the legislative history in this context. Moreover, the District Court made no meaningful effort to assess whether "the agency's [interpretation] is based on a permissible construction of the statute" (Chevron U.S.A., Inc. v. NRDC, 467 U.S. at 843), despite the fact such social or economic effects have been: (i) considered by the Corps since 1933 (see United States v. Dern, 289 U.S. 352 (1933); Zabel v. Tabb, 430 F.2d 199, 207 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971)(The RHA "itself does not put any restrictions on denial of a permit or the reasons why the Secretary may refuse to grant a permit"))); (ii) integrated into the Corps' Public Interest Review regulation since 1974 (App. D at 51a); (iii) required, under the reasonably foreseeable standard, to be

considered by the CEQ regulations^{2/}; and (iv) formally considered, based on six years of legal and factual analysis in this case and, with even greater breath and detail, in Bersani v. EPA, 674 F. Supp. 405 (N.D.N.Y. 1987), aff'd, Nos. 87-6275, 87-6295, slip op. (2d Cir. June 8, 1988)(economic viability and market-place impacts of proposed mall on the region considered by the U.S. ACOE and EPA in CWA permit decision). The District Court, in the end, emerged as the "democratically accountable" (App. D at 75a) Branch of government, failed to show any deference to the U.S. ACOE's interpretation of its obligations (Udall v. Tallman, 380 U.S. 1, 16 (1965); Morton v. Ruiz, 415 U.S. 199, 231 (1974)), and

^{2/} In fact, the District Court does not even cite the CEQ regulations.

"substitute[d] its own construction of a statutory provision for a reasonable interpretation made by the . . . agency." Chevron U.S.A., Inc. v. NRDC, 467 U.S. at 844.

The U.S. ACOE, for an indeterminate period of time, is now free to impose within the First Circuit -- if not elsewhere -- a new legal standard concerning indirect, induced or cumulative social and economic impacts that departs from its previously accepted practice, as acknowledged by the U.S. ACOE in the District Court. See Federal Defendant's Reply Memorandum, on Cross-Motions for Summary Judgment at 9. At stake is the daily administration of three major statutes: NEPA, CWA and RHA.

Moreover, no court -- including the Court of Appeals for the Eighth Circuit relied upon by the District Court here (App. D at 68a) -- has applied the

"proximately related" standard beyond the limited, threshold question of whether an EIS should be prepared. In Olmsted Citizens For a Better Community v. United States, 793 F.2d 201 (8th Cir. 1986), the Eighth Circuit was confronted with the threshold question of whether an EIS was required based not on any allegations of environmental harm but on the possible "introduction of weapons and drugs into the area . . . [and] . . . an increase in crime" Id. at 205. It concluded an EIS was not necessary, relying on the "proximately related" standard of Metropolitan Edison, 460 U.S. 766 (1983), the fact that "we are not convinced that Olmsted Citizens has identified any significant impacts on the physical environment" (Olmsted, 793 F.2d at 206) and that "[e]ven before Metropolitan Edison" (id.), a similar result would have lied. Moreover, subsequent court decisions have

interpreted Metropolitan Edison to be limited to the threshold question of whether NEPA applies in the absence of recognized environmental impacts. See Pacific Northwest Bell Telephone Co. v. Dole, 633 F. Supp. 725, 727 (W.D. Wash. 1986); Ono v. Harper, 592 F. Supp. 698, 701 (D. Haw. 1983); Animal Lovers Volunteer Assoc. v. Weinberger, 765 F.2d 937, 938 (9th Cir. 1985); Glass Packaging Institute v. Regan, 737 F.2d 1083, 1091-93 (D.C. Cir.), cert. denied, 469 U.S. 1035 (1984). Here, it is beyond peradventure that: (i) significant physical, environmental impacts were present (i.e., depositing one million cubic yards of fill; harm to 30 acres of wetlands; flooding problems, etc.); (ii) the U.S. ACOE prepared a multi-volume EIS -- a legal and factual determination not challenged below; (iii) numerous federal and state agencies substantiated the environmental,

social and economic impacts of the project; and (iv) the demonstrable, physical, economic and social impacts on the region, including New Haven, was thoroughly documented and found by the U.S. ACOE in its EIS and ROD's. Under such circumstances, the District Court decision -- by extending the "proximately related" standard of Metropolitan Edison and precluding consideration of the regional mall's social and economic effects on the region -- is directly in conflict with those of at least the 2nd and 9th Circuits (Rochester v. United States Postal Service, 541 F.2d 967, 973 (2d Cir. 1976); Bersani v. EPA, Nos. 87-6275, 87-6295, slip op. (2d Cir. June 8, 1988); Davis v. Coleman, 521 F.2d 661, 676-77 (9th Cir. 1975)); the CEQ regulations requiring consideration of "reasonably foreseeable" effects (including social and economic effects that are "later in

time or farther removed in distance," 40 C.F.R. 1508.8(b)); and the Corps' own Public Interest Review regulation; and, without reason and contrary to sound judicial administration, the limited holdings of the 9th (Animal Lovers Volunteer Assoc. v. Weinberger, 765 F.2d at 938-39) and D.C. Circuits (Glass Packaging Institute v. Regan, 737 F.2d at 1091).

Certainly, the "issue is a serious and unsettled one" Bender v. Clark, 744 F.2d at 1428. At stake is the uncertainty in outcome of such an important matter and the rights of numerous permit applicants, the U.S. ACOE and the public (Paluso v. Mathews, 573 F.2d 4, 8 (10th Cir. 1978)), as well as the fate of thousands of acres of wetlands within New England, if not elsewhere; all placed at risk without appellate review. "The public interest . . . would lose by such a procedure." Brown Shoe Co. v. United

States, 370 U.S. 294, 309 (1962).

3. The Court of Appeals determination that the Government enjoys some special status vis-a-vis intervenors with respect to appellate rights (App. B at 14a-15a) conflicts directly with Bryant v. Yellen, 447 U.S. 352, 366-68 (1980), the protection afforded by Rule 24(a) of the Federal Rule of Civil Procedure and the precedents of at least the 9th and D.C. Circuits. If not corrected, its consequences will be insidious; lurking, perhaps inconspicuously for now, with grave effect on those who, in the context of litigation, are dependent on the government to vindicate individual rights or seek judicial redress on matters of public importance.

The City of New Haven was granted the right to intervene under Federal Rule of Civil Procedure 24(a). App. E at 86a. As an intervenor, New

Haven has the right to appeal an adverse ruling regardless of whether the government seeks such an appeal. Bryant v. Yellen, 447 U.S. at 366-68; NL Industries, Inc. v. Secretary of Interior, 777 F.2d 433, 436 (9th Cir. 1985); United States v. AT&T, 642 F.2d 1285, 1293-94 (D.C. Cir. 1980). It would defeat the entire purpose of Rule 24(a) if the finding of "inadequate representation" had application only in the District Court. The Government could, with impunity and without explanation, simply defeat the interests of the intervenor by acquiescing in the views of its adversary through "settlement," whether expressed in formal terms or undertaken with the quiet passage of the time beyond which it must appeal. See Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983).

The insidious nature of the Court of Appeals determination also is

founded in the absence of an explanation for the Government's conduct. As this Court is aware, the Record of Decision was issued by the New England Division of the U.S. ACOE; defending that decision in litigation is not its responsibility. The Justice Department's determination not to appeal may have been premised on a philosophical discomfort with the New England Division's denial of a permit or the political discomfort of being on the "wrong side" in the Court of Appeals. It also may have simply missed the jurisdiction deadline for filing a notice of appeal. Its motion to dismiss New Haven's appeal in this case was made without citations or legal argument. In fact, in the 5 months the U.S. ACOE's motion was pending, it was never requested by the Court of Appeals -- despite our insistence -- to explain either why it was made or what the effect would be if this

appeal proceeded. Nonetheless, the Court of Appeals fashioned a rule denying an intervenor from appealing based, in part, on its own assumptions, or those extracted from other cases, as to the Government's motivation or the effect on New Haven. In the end, it protected the U.S. ACOE decision not to appeal, imposed enormous litigation burdens on New Haven (let alone on others who actively opposed the issuance of the permit before the U.S. ACOE) and radically altered the factual and legal posture of the case, without any reasoning articulated by the rule's primary beneficiary, the U.S. ACOE.

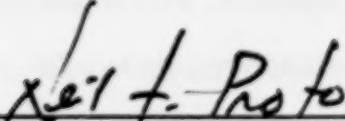
In any event, New Haven is entitled to "all the prerogatives of a party litigant" (United States v. AT&T, 642 F.2d at 1294), including the right to appeal since, as is abundantly obvious here, New Haven's interests were "not

adequately represented in the decision
[by the U.S. ACOE] not to appeal." Id.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

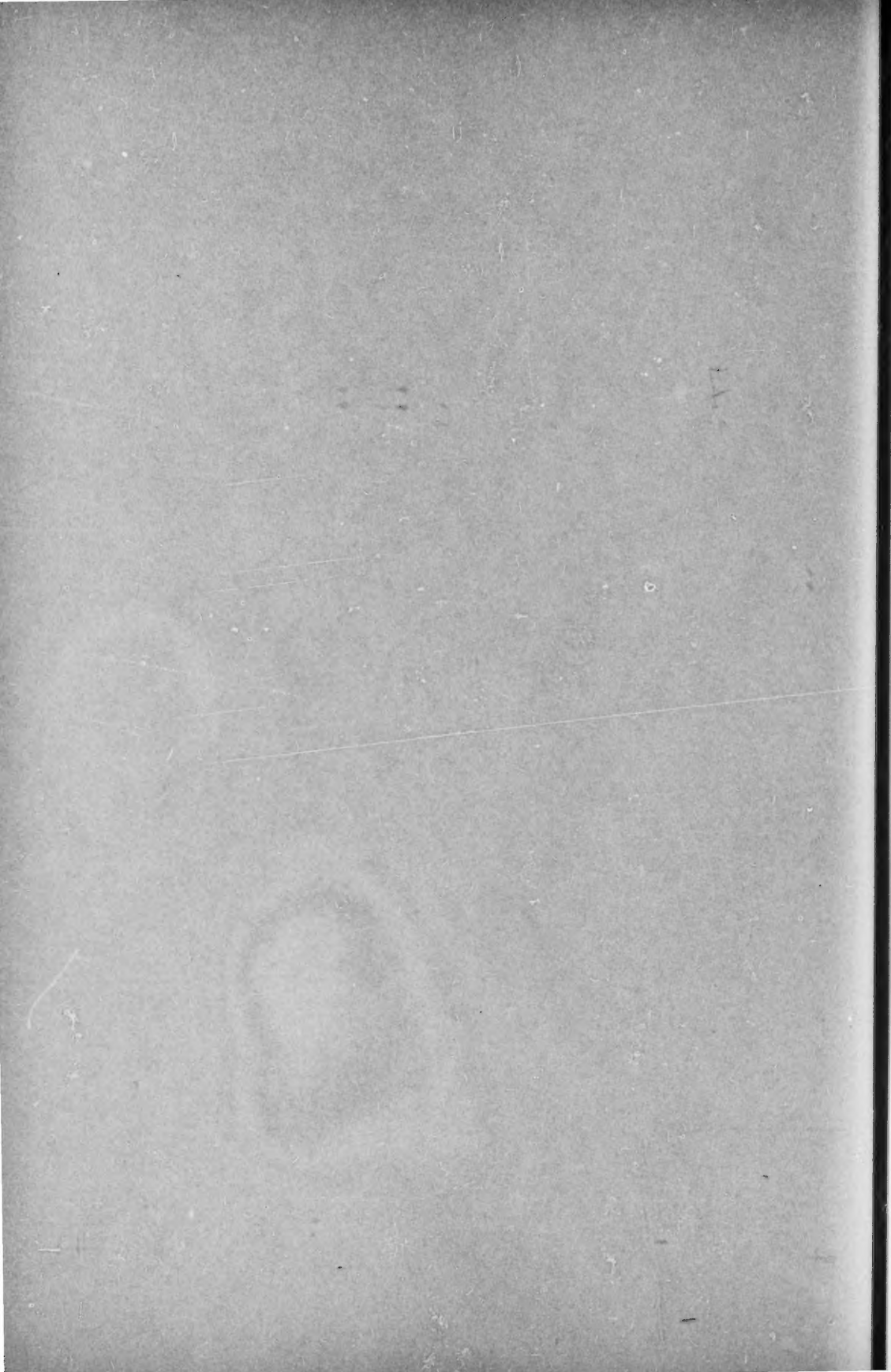


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July 5, 1988

ADDENDUM



ADDENDUM

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. Section 101(b)(5) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4331(b) provides in pertinent part:

(b) In order to carry out the policy set forth in this chapter [42 U.S.C.S. §§ 4321 et seq.], it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--

* * *

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; . . .

2. Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332, provides in pertinent part:

[Section 102(2)(C)]

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter [42 U.S.C. §§ 4321 et seq.], and (2) all agencies of the Federal Government shall--

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code [5 U.S.C.S. § 552], and shall accompany the proposal through the existing agency review processes;

3. Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, provides in pertinent part:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any . . . structures in any . . . navigable river, or other water of the United States, outside established harbor lines, or where no harbor

lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; . . .

4. Section 404 of the Clean Water Act, 33 U.S.C. § 1344, provides in pertinent part:

(a) Discharge into navigable waters at specified disposal sites. The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites. Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous

zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

* * *

(d) The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

5. The Administrative Procedure Act, 5 U.S.C. § 706(2)(A) provides in pertinent part:

The reviewing court shall --

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

(D) without observance of procedure required by law; . . .

6. 28 U.S.C. § 1291 provides:

The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . .

7. The "Public Interest Review" regulation of the Army Corps of Engineers, 33 C.F.R. § 320.4 (a) and (q), provides:

(a) Public Interest Review.

(1) The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards,

floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria (See §§ 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.

(q) Economics. When private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the marketplace. However, the district engineer in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest. The economic benefits of many projects are important to the local community and contribute to needed improvements in the local economic base, affecting such factors as employment, tax

revenues, community cohesion, community services, and property values. Many projects also contribute to the National Economic Development (NED)(i.e., the increase in the net value of the national output of goods and services).

8. The regulations of the Council on Environmental Quality, 40 C.F.R. § 1502.16, 40 C.F.R. § 1508.7, 40 C.F.R. § 1508.8(a)(b), and 40 C.F.R. § 1508.14 provide:

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented . . .

* * *

(1502.16 (cont.))

It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local . . . land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. . . .

* * *

(g) Urban quality . . . and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can

result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both

beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.14 Human environment.

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

9. Federal Rule of Civil Procedure 24(a) provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction

which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

* * *



CERTIFICATE OF SERVICE

I hereby certify that on July 5, 1988 I caused copies of the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit and the Appendix thereto to be served via first class mail, postage prepaid, or by hand delivery ("**"), upon:

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No. 88-

Supreme Court, U.S.

FILED

JUL 5 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CITY OF NEW HAVEN, CONNECTICUT,
Petitioner,

v.

JOHN O. MARSH, JR., SECRETARY OF
THE ARMY, *et al.*
Respondents.

**APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1827

MALL PROPERTIES, INC.,
Plaintiff, Appellee,

v.

JOHN O. MARSH, JR., ETC., ET AL.,
Defendants, Appellees,

CITY OF NEW HAVEN,
Intervenor-Defendant, Appellant.

Before

CAMPBELL, Chief Judge, COFFIN,
BOWNES, BREYER, TORRUELLA
and SELYA, Circuit Judges.

ORDER OF COURT

Entered: April 7, 1988

The panel of judges that rendered the decision in this case having submitted by the City of New Haven and its suggestion for the holding of a rehearing en banc having been carefully considered

by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing be both denied.

By the Court:

//s//

Clerk.

[cc: Messrs. Lawson, Proto, Cochran, Richmond, Shelley, Robinson, Friedman, Tripp and Dewey]

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 87-1827

MALL PROPERTIES, INC.,

Plaintiff, Appellee,

v.

JOHN O. MARSH, JR., ETC., ET AL.,

Defendants, Appellees,

CITY OF NEW HAVEN,

Intervenor-Defendant-Appellant.

APPEAL FROM THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, U.S. District Judge]

Before

Coffin, Bownes and Breyer,

Circuit Judges.

Kathleen P. Dewey, Appellate
Section, Land and Natural Resources
Division, Department of Justice, for
federal appellees' motion to dismiss.

Alice Richmond, Hemenway & Barnes,
Daniel Riesel, and Sive, Paget & Riesel,
P.C., on memoranda in support of motion
to dismiss for appellee Mall Properties,
Inc.

Neil Proto, Kelley, Drye and Warren,
Frank B. Cochran, Peter B. Cooper,
Cooper, Whitney, Cochran & Francois,
Edward F. Lawson, and Weston, Patrick,
Willard & Redding on memoranda in
opposition to motion to dismiss for
appellant City of New Haven.

MARCH 11, 1988

Per Curiam. The government has filed a motion to dismiss, joined in by appellee Mall Properties, Inc., contending that a district court order remanding to the Corps of Engineers for further proceedings is not a final appealable order and hence the present appeal should be dismissed. Appellant City of New Haven opposes the motion to dismiss. We reject the City's argument that the motion to dismiss was untimely. Jurisdictional defects are noticeable at any time. We turn, then, to the background.

Plaintiff Mall Properties, Inc., applied to the Corps of Engineers for permits to fill wetlands so that plaintiff might build a 1.1 million square foot, two story shopping mall in North Haven, Connecticut. The Corps denied the permit. Among the factors the Corps considered in concluding the project was

contrary to the public interest was, first, the City of New Haven's opposition to the mall on the ground that a North Haven mall would adversely impact New Haven's economic development and, second, the Governor of Connecticut's statement at a July 1985 meeting that building the North Haven Mall was not worth the risk to New Haven. The district court ¹ concluded that the Corps had exceeded its authority (1) by basing the permit denial on socio-economic harms not proximately related to changes in the physical environment and (2) by not following its regulations which required that Mall

1. Though plaintiff Mall Properties is a New York corporation and the mall is proposed to be built in Connecticut, venue in Massachusetts of the present action was premised on 28 U.S.C. § 1391(e)(1) as one of the federal defendants, the Divisional Engineer of the New England Division of the Army Corps of Engineers, resides in Massachusetts.

Properties be provided notice of an opportunity to rebut the objection made by the Governor of Connecticut. Accordingly, the court remanded the case to the Corps for further proceedings consistent with its opinion. The question, then, is whether this remand order is now appealable.

New Haven argues that the district court entirely disposed of the matter before it -- Mall Properties' petition for review -- and granted Mall Properties the relief requested -- a remand to the Corps. Hence, New Haven contends, the judgment is a final one. We disagree. Ultimately, Mall Properties wants the proper permits themselves and, in the event of a judicial challenge to the permit, a judgment adjudicating Mall's entitlement to the permits. Indeed, originally Mall's complaint asked the court

to direct the Corps to issue Mall the permits (though Mall subsequently acknowledged that a remand would be the proper remedy were it to prevail). Thus, the district court's remand order does not grant Mall ultimately what Mall wants. Rather, the court's order is but one interim step in the process towards Mall's obtaining its ultimate goal. Consequently, we do not view the remand order as meeting the traditional definition of a final judgment, that is, one which "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). The litigation has not ended. It simply has gone to another forum and may well return again. Cf. In re Abdallah, 778 F.2d 75 (1st Cir. 1985)(district court order remanding case

to bankruptcy court for further proceedings not final appealable order), cert. denied, 106 S. Ct. 1973 (1986); Giordano v. Roudebush, 565 F.2d 1015 (8th Cir. 1977)(district court order ruling that plaintiff was not entitled to a full trial type procedure but remanding to agency for further consideration of plaintiff's arguments neither granted nor denied the ultimate relief plaintiff wanted -- reinstatement and back pay -- and was not a final appealable order); Transportation-Communication Division v. St. Louis-San Francisco Ry. Co., 419 F.2d 933, 935 (8th Cir.)(district court order which neither enforced nor denied enforcement of Board's award, but rather decided some issues and remanded for further proceedings, made no final determination of the entire merits of the controversy and is not appealable), cert

denied, 400 U.S. 818 (1970). The order is not final in the usual sense.

This court and others have said that generally orders remanding to an administrative agency are not final, immediately appealable orders. See, e.g., Pauls v. Secretary of Air Force, 457 F.2d 294, 297-298 (1st Cir. 1972)(order remanding to Air Force Board for the Correction of Military Records directing discovery and detailed fact findings not appealable);² Memorial Hospital System v. Heckler, 769 F.2d 1043 (5th Cir. 1985) (hospital appeal from order remanding for further proceedings relating to Medicare

2. New Haven seeks to distinguish Pauls on the ground that there the district court remanded but retained jurisdiction to review the final determination of the Secretary of the Air Force. The retention of jurisdiction was not the basis for our determination that the remand order was not appealable.

reimbursement dismissed); Howell v. Schweiker, 699 F.2d 524 (11th Cir. 1983) (claimant may not appeal from order remanding to Secretary for further proceedings); Eluska v. Andrus, 587 F.2d 996, 999-1001 (9th Cir. 1978)(order remanding to Board of Land Appeals so that plaintiff may exhaust administrative remedies not appealable even though once such remedies are exhausted it may not be possible to review exhaustion order). See also 15 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure §§. 3914 at pp. 551-553 (1976).

Exceptions have been recognized in some cases, however, and appeals have been allowed from orders remanding to an administrative agency for further proceedings. See, e.g., United States v. Alcon Laboratories, 636 F.2d 876, 884-885 (1st Cir.)(remand order putting in issue

order in which agency enforcement action should proceed appealable under Cohen collateral order doctrine), cert. denied, 451 U.S. 1017 (1981); Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1975)(Chairman's appeal from order remanding to Civil Service Commission allowed); Paluso v. Mathews, 573 F.2d 4 (10th Cir. 1978) (Secretary's appeal from order remanding for further proceedings with respect to coal miner's application for benefits); Citizens to Preserve Overton Park v. Brinegar, 494 F.2d 1212 (6th Cir. 1974) (no discussion of appealability), cert denied, 421 U.S. 991 (1975).

Trying to make order out of the case law, the City of New Haven argues that whereas remands for factual development may not be appealable orders, under a practical conception of finality, district court orders which determine an

important legal issue, announce a new standard, and impose a new legal standard or procedural requirements upon the agency in the remand proceeding should be considered final and immediately appealable. Indeed, citing a number of cases, the City argues that that is in fact the distinction the case law has drawn.

In particular New Haven relies heavily on Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984). There, a crucial issue was whether a particular tract of land contained a known geologic structure (KGS). If it did, petitioner's noncompetitive oil and gas lease offer for the land would have to be rejected and the land could only be leased by competitive bidding. The Interior Board of Land Appeals determined that the government had made a prima facie case of the existence of a KGS and that petitioner had failed

to show by "clear and definite evidence" that the government had erred. Petitioner sought judicial review. The district court concluded the Board had imposed too high a standard of proof on petitioner. Rather than "clear and definite" evidence, petitioner need only prove government error by a preponderance of the evidence. Consequently, the district court remanded to the Board for further proceedings applying the correct burden of proof. The government appealed. In determining whether the remand order was immediately appealable, the Tenth Circuit stated that "[t]he critical inquiry is whether the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review." Id. at 1427. The court decided the matter in favor of immediate appeal stating two reasons. First was the fact that the

standard of proof issue was a serious and unsettled one. But second, "and perhaps most important," the court said, was that the government had no avenue for obtaining judicial review of its own administrative decisions and thus well might be foreclosed from appealing the district court's burden of proof ruling at a later stage of proceedings.

In contrast to Bender, in the present case the government has not appealed. In other words, the government is not challenging the district court's ruling (1) that the Corps of Engineers may not deny permits on the basis of socioeconomic harms unrelated to physical environmental changes and (2) that the Corps violated its regulation in not giving Mall Properties an opportunity to rebut the governor's opposition. Many of the other cases on which the City of New

Haven relies, see, e.g., Stone v. Heckler, 722 F.2d 464, 467 (9th Cir. 1983) (district court order ruling that Secretary could not apply grid but rather must use VE to enumerate specific jobs available and remanding for further proceedings is immediately appealable by government since, were the application of the district court's legal standard to lead to benefits being awarded on remand, the Secretary would not be able to appeal); Gueory v. Hampton, 510 F.2d 1222, 1225 (D.C. Cir. 1975)(unless review allowed government probably never would be able to test district court ruling); Gold v. Weinberger, 473 F.2d 1376 (5th Cir. 1973) (unless Secretary allowed to appeal remand order, Secretary will not obtain review of district court ruling that VE required to interview claimant), are similar to Bender in that an appeal from

a remand order was allowed by the government or government agency unlikely thereafter to be able to obtain review. Indeed, we think the crucial distinction in these cases is not -- as New Haven would contend -- simply the fact that the district court imposed a new or unsettled legal standard on the agency, but rather that unless review were accorded immediately, the agency likely would not be able to obtain review.

The City of New Haven argues, however, that it is similarly situated to the governmental agencies whose appeals from remand orders were allowed for, the City says, denying it review now is tantamount to foreclosing any effective review at all. That is because, the City maintains, the district court decision precluding the Corps from considering socio-economic factors has removed from

the Corps' consideration the economic interests at the heart of the City's opposition to the permits and has effectively terminated the City's participation. The City is wrong. The City has not been foreclosed from participating in the proceedings on remand. Presumably, it can urge environmental reasons why the permits should be denied. If, after remand, the permits are granted, the City can seek judicial review and if the district court upholds the grant, the City can appeal to this court and both argue that the original permit denial based on New Haven's socio-economic developmental interests was proper and present any other challenges arising from the remand proceedings it may have. Thus, review of the socio-economic issue the City now wants to present, is not denied; it is

simply delayed. ³ For this reason, the remand order is not appealable under the Cohen collateral order doctrine as the third requisite for collateral order appealability -- a right incapable of vindication on appeal from final judgment -- see Boreri v. Fiat S.P.A., 763 F.2d 17, 21 (1st Cir. 1985) -- is not met.

3. The City's argument that the district court judgment may have res judicata affect is wrong. A prerequisite to the application of res judicata principles is a final judgment, Restatement (Second) Judgments § 13 (1980), but, as we conclude here, the district court judgment remanding to the agency is not a final judgment. Nor does the City's argument that on a petition for review following remand the district court may refuse to reconsider the socio-economic issue persuade us otherwise. Under law of the case principles that may indeed happen. Nevertheless, the City will be able to challenge on appeal the district court's original (September 8, 1987) decision.

Moreover, contrary to the City's argument, we think allowance of an immediate appeal would violate the efficiency concerns behind the policy against piecemeal appeals. Were this court now to order briefing on the socio-economic issue, decide that issue and affirm the district court, the case would be remanded and the Corps once again would decide whether to issue the permit. Likely another appeal would follow, necessitating another round of briefs, another familiarization with the record, and another opinion. Our decision on the socio-economic issue might turn out to have been superfluous were the Corps on remand to deny the permits on independent proper grounds. More efficient and quicker, in the long run, would have been to delay review and consider all issues at one time. Alternatively, were review

granted now and were we to conclude the district court erred, an unnecessary administrative proceeding could be averted. 4 But this alone is insufficient reason to permit review. As the Third Circuit observed in Bachowski v. Usery, 545 F.2d 363, 373 (3d Cir. 1976) when dismissing an appeal from a district court order remanding to the Secretary of Labor for further proceedings, "the wisdom of the final judgment rule lies in its insistence that we focus on systemic,

4. However, according to the district court opinion, Mall Properties had several other arguments for vacating the Corps' order which the district court found unnecessary to address since it was remanding on other grounds; hence, further proceedings in the district court on these issues followed by another appeal might result even if we were not to rule in New Haven's favor on both the socio-economic issue and procedural issue concerning failure to afford Mall Properties an opportunity to rebut the governor's opposition.

as well as particularistic impacts." To reach out to decide the merits of an interlocutory order just because reversal of an erroneous interlocutory ruling would expedite a particular litigants' case would, in the long run, undermine the final judgment rule and open the door to piecemeal litigation and its concomitant delay, costs, and burdens. See also 15 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 3914 at pp. 552-553 (strong showing of unusual reason for avoiding the burden of further administrative proceedings should be required before a remand order is treated as final).

New Haven asks that if the remand order is not a final appealable order we construe New Haven's notice of appeal as a petition for mandamus. We see no extraordinary circumstances warranting the exercise of mandamus jurisdiction.

The request for oral argument on the motion to dismiss is denied and the appeal is dismissed for lack of jurisdiction.

Since this appeal has been dismissed on jurisdictional grounds, the motion of North Haven League of Women Voters and Stop the Mall/Connecticut Citizen Action Group to file an amicus brief is denied.

Appeal dismissed.

Adm. Office, U.S. Courts --
Blanchard Press, Inc., Boston, Mass.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1827

MALL PROPERTIES, INC.,
Plaintiff, Appellee,

v.

JOHN O. MARSH, JR., ETC., ET AL.,
Defendants, Appellees,

CITY OF NEW HAVEN,
Intervenor-Defendant-Appellant.

JUDGMENT

Entered: March 11, 1988

This cause was submitted on briefs on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The appeal is dismissed.

By the Court:

//s//

Clerk.

[cc: Messrs. Dewey, Richmond and Proto]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MALL PROPERTIES, INC.,)
Plaintiff,)
)
v.) C.A. No. 85-4038-W
)
JOHN V. MARSH,)
Defendant.)

MEMORANDUM AND ORDER

WOLF, D.J.

September 8, 1987

Mall Properties, Inc., a developer of shopping malls, brought this action, seeking an order vacating the denial by the U.S. Army Corps of Engineers (the "Corps") of an application for a permit under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act, 33 U.S.C. §§ 403 and 1344 (1982). The permit is required for the development of a proposed mall on a site in the Town of North Haven, Connecticut.

The court finds that the Corps' order denying the permit must be vacated because its decision was not made in accordance with law. Rather, the Corps exceeded its authority (1) by basing its denial of the permit on socio-economic harms that are not proximately related to changes in the physical environment and (2) by not following its regulations which required that Mall Properties be provided notice and an opportunity to attempt to reverse or rebut an objection to the construction of the proposed mall made by the Governor of Connecticut. These errors require a remand of the case to the Corps.

I. BACKGROUND

Mall Properties is an organization which for many years has sought to develop a shopping mall in the Town of North Haven, Connecticut. North Haven is a

suburb about ten miles from New Haven, Connecticut.

As the proposed development would involve the filling of certain wetlands and open waters, Mall Properties must obtain a permit from the Corps pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344 ("Section 404") and Section 10 of the Rivers and Harbor Act, 33 U.S.C. § 403 ("Section 10"). Although "the Corps administers a dual permit system under two different statutes ... to regulate dredge and fill activities," United States of America v. Cumberland Farms, C.A. No. 86-1983 (1st Cir. Aug. 18, 1987), the procedures and standards utilized by the Corps, and in dispute in the instant case, are equally applicable to both acts. See 33 C.F.R. § 320 (1986).

The City of New Haven has consistently opposed development of the mall.

It claims that a North Haven mall will jeopardize the fragile economy of New Haven, which all levels of government have long been seeking to revitalize. New Haven has actively participated in proceedings before the Corps and in this litigation.^{1/}

As required by law, 33 C.F.R. § 320.4(a), the Corps conducted a public interest review in connection with deciding whether to issue Mall Properties the requested permit. Acting for the Corps in this matter was Colonel Carl B. Sciple.

^{1/}The court allowed New Haven to intervene as a defendant in this action under F.R.Civ.P. 24. See Memorandum and Order, May 12, 1986. Three environmental groups -- the Connecticut Fund for the Environment, the Environmental Defense Fund, and the Conservation Law Foundation -- were denied leave to intervene, but allowed to inform the court of their views as amicus curiae. Id. These groups may also present their arguments to the Corps in the proceedings which must be conducted pursuant to the remand of this case.

On August 25, 1985, Colonel Sciple denied Mall Properties' request for a permit. In the Record of Decision ("ROD") providing the explanation for the denial, Colonel Sciple concluded by summarizing the relative roles of various factors in his decision. He wrote:

I have considered many factors in my public interest review of the applicant's proposal. Land use is one of those factors, and I recognize that the decision of state and local government is conclusive as to that factor. In the matter under consideration, the views of the state and the local government about the proposed project are different. While the land may be used for a shopping mall under North Haven's zoning regulations, the Office of Policy and Management, Comprehensive Planning Division, of the State of Connecticut has taken the position that the development of a shopping mall at North Haven is inconsistent with the state's conservation and development policies. But even where state and local authorities give zoning or other land use approval, a person conducting a public interest review

must make a thorough objective evaluation of an application in full compliance with applicable laws and regulations (See 49 FR 39478 and 39479).

Therefore, in my public interest review I considered factors other than land use. Those factors, where applicable, are listed in 33 Code of Federal Regulations Section 320.4(a), namely, conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, flood hazards, flood plain values, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, flood and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people.

The resubmission^{2/} presented on-site wetland mitigation to compensate for the most important wetlands lost. Portions of parking areas would be raised, and additional flood

^{2/A} proposed Final Order denying the permit was issued on November 24, 1984. Mall Properties subsequently submitted proposed modifications which the Corps agreed to consider.

storage was proposed to lessen previous flooding impacts. Socio-economic impacts to New Haven were proposed to be mitigated by the opening of three anchor stores in 1987, delaying until 1991 the opening of the fourth anchor store, contributing \$100,000 in job training funds to the city of New Haven, and petitioning the transit authority to provide bus service for potential mall employees of New Haven.

[The Colonel found that] although there is still a net loss in wetland resources, the proposed on-site wetland creation, if successfully developed, would substantially compensate for lost value of the most important seven acres of wood swamp and freshwater marsh. Flooding impacts, although lessened further and not major, are nonetheless troublesome to me when viewed against the policies of the flood plain executive order and one of the Corps basic missions of providing flood protection.

Still weighing most heavily, however, is my concern for the socio-economic impacts this project would have on the city of New Haven. I had encouraged the applicant to meet with the Mayor of New Haven with the

hope that they would find common ground. Even though they met, it was to no avail. While the applicant has made proposals to mitigate socio-economic impacts, including the most recent one described above, he has not, in my view, gone far enough.

The Hartford regional office US Department of Housing and Urban Development has expressed concerns about the mall from a national and Federal perspective. (Recently there has been an indication that these views might be tempered at its Washington level.) Local elected leaders have differing views on the Mall. The First Selectman of North Haven favors the Mall, the Mayor of New Haven is opposed to the Mall. At the State level, the Connecticut Office of Policy and Management, Comprehensive Planning Division has stated that the Mall is contrary to state urban policies. Also, during my July 1985 meeting with Connecticut's Governor O'Neill, he indicated that he felt it was not worth the risk to New Haven of building the North Haven Mall. I have therefore concluded, that this project is contrary to the public interest and the permit is denied.

ROD pages 45 to 47. (Emphasis added).

Mall Properties subsequently filed this action requesting that the order denying the permit be vacated. In the course of this case Mall Properties withdrew its initial request for injunctive relief in the form of an order requiring issuance of the permit. Thus, it is not disputed that remand to the Corps is the sole appropriate remedy if Mall Properties prevails in this action.

Mall Properties requests that the order denying its permit be vacated primarily on the ground that the Corps improperly relied on the effect that the North Haven mall would have on the economy of New Haven in reaching its decision. Mall Properties also contends that the Corps acted illegally in receiving and relying upon an objection to the mall by the Governor of Connecticut which it

was not afforded an opportunity to address.^{3/} The defendants assert that Mall Properties' claims are incorrect as matters of law.

The parties filed cross-motions for summary judgment. They agree that the material facts are not in dispute. A hearing was held on the cross-motions. Thus, the case is ripe to be decided.

II. THE STANDARD OF REVIEW

The standard of review to be applied in this case is established by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)(D)(1982). "The applicable scope of review calls for determination

^{3/}Mall Properties' complaint also alleges several other grounds for vacating the Corps' order which, because the case is being remanded, it is not necessary to address.

of whether the Corps' action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or 'without observance of procedure required by law.'" Hough v. Marsh, 557 F. Supp. 74, 79 (D.Mass. 1982)(quoting from 5 U.S.C. § 706(2)(A)(D)). See generally Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

III. CONCLUSIONS OF LAW

A. The Corps' Reliance On The Socio-Economic Impacts On New Haven Was Not In Accordance With Section 404, Section 10, or The Corps' Public Interest Review Regulations.

As the ROD states, the factor "weighing most heavily" in the Corps' decision to deny Mall Properties a permit was the "concern for the socio-economic impacts this project would have on the City of New Haven." ROD at 46. The record reveals that these impacts would

not result from any effect the mall would have on the physical environment generally or wetlands particularly. Rather, it is the economic competition for New Haven which would result from the mere existence of a mall anywhere in North Haven which was the most significant factor in the Corps' decision to deny the permit. The Corps did find that there was no alternative site for the mall in North Haven. This, however, does not alter the fact that there is in this case no proximate causal relationship between the impact of the proposed development on the natural environment and the economic harm to New Haven which the Corps deemed most significant in denying the permit.

Mall Properties contends that while certain economic factors may properly be considered by the Corps in deciding whether to grant a permit, the Corps has

not been empowered generally to regulate economic competition between communities and to make political decisions as to which community's economic interests ought to be preferred.

The defendants contend that the Corps has the unqualified right and responsibility to consider economics in deciding whether to issue a permit. They note that the relevant Corps regulations state that the Corps review has "evolved from one that protects navigation only to one that considers the full public interest" 33 C.F.R. § 320.1(a). See generally, Power, The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers, 63 Va. L. Rev. 503, 526-29 (1977)(describing evolution of Corps jurisdiction from the manageable job "of determining whether proposed structure impedes maritime traffic to

public interest balancing."); Rodgers, Environmental Law Air and Water 205 (1986)("Here is the corps famed 'public interest' review that reads like a parody of standardless administrative choice."); 1902 Atlantic Ltd. v. Hudson, 574 F. Supp. 1381, 1398 n. 16 (E.D.Va. 1983).

As explained below, consideration of the purposes of Section 404 and Section 10, the relevant provisions of those laws, the "public interest" review regulations of the Corps, and the pertinent case law persuades the court that the Corps' action in this case was not in accordance with law. More specifically, the court concludes that in deciding whether to grant a permit the Corps may consider economic effects which are proximately related to changes in the physical environment. The Corps may not, however, properly consider and give significant weight to economic effects unrelated

to the impact which a proposed project will have on the environment. Thus, the Corps exceeded its authority in this case.

Section 404 (33 U.S.C. § 1344) states:

(a) The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified sites.

(b) Subject to subsection (c) of this section, each disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines ... which ... shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

The Secretary's authority to act under this provision has been delegated to the Corps. 33 C.F.R. § 320.2(f).

Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 states:

[I]t shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of ... any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

The Secretary's authority under this provision has also been delegated to the Corps. See 33 C.F.R. § 322.5.

In making its economic analysis in this case, the Corps relied on the public interest review regulation expressly applicable to both Section 404 and Section 10. That regulation, 33 C.F.R. § 320.4(a), provides that in deciding whether to issue a permit the Corps must

conduct a public interest review balancing the

benefits which reasonably may be expected to accrue from the proposal ... against its reasonably foreseeable detriments.^{4/} ... Among [the factors to be considered] are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and in general, the needs and welfare of the people.

33 C.F.R. § 320.4(a).

The scope of the economic analysis to be conducted by the Corps is not directly addressed in the regulations.

^{4/}These provisions explicitly apply to both the Clean Water Act and the Rivers and Harbors Act.

Rather, although "economics has been included in the Corps' list of public interest factors since 1970 there has never been a specific policy on economics in the regulations." 51 Fed. Reg. 41207 (1986).

Therefore, the court in this case is called upon to discern the scope of the authority to consider economic factors which has been delegated to, and exercised by, the Corps. It is axiomatic that this decision must take into account the legislative intent reflected by the stated purposes and policies of the relevant statutes.^{5/} More specifically, as

^{5/}As Justice Felix Frankfurter said:

Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim,
FOOTNOTE CONTINUED

the Supreme Court has stated in addressing the effects which may be properly considered in deciding whether an Environmental Impact Statement ("EIS") is required under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq., courts must in cases such as this consider the underlying policies of the relevant statute in deciding whether an actor should be held responsible under that statute for certain effects of his actions. Metropolitan Edison Co. v. People Against Nuclear Energy et al., 460

FOOTNOTE 5/ CONTINUED:

that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate

F. Frankfurter, "The Reading of Statutes," in Of Law and Men 60 (1956).

U.S. 766, 774 n. 7 (1983)("In the context of both tort law and NEPA, courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.").

"Section 404 of the Clean Water Act was enacted 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. § 1251(a)(1976)(section entitled 'Congressional declaration of goals and policy')." Buttrey v. United States, 690 F.2d 1170, 1180 (5th Cir. 1982), cert. denied, 461 U.S. 927 (1983). The plain statement of legislative purpose contained in § 1251(a) is echoed in the legislative history which indicates that Section 404 was enacted "to protect the quality of water and to protect critical

wetlands" 3 Legislative History of the Clean Water Act of 1977, 95th Congress 2d Sess. at 532 (1978). Thus, the purpose of Section 404 suggests that the scope of economic inquiry which the Corps has been authorized to conduct is confined to consideration of effects related to alterations in the physical environment.

The pertinent provisions of the Clean Waters Act and the related regulations reinforce the view that Section 404 only authorizes the Corps to weigh economic effects related to changes in the physical environment. The statutory provision concerning permits for dredged or fill material under which the Corps was acting in this case is 33 U.S.C. § 1344. Section 1344(b)(1) provides that Corps' permit decisions must be governed by guidelines based upon "criteria comparable to the criteria applicable to the

territorial seas, the contiguous zone, and the ocean under [33 U.S.C. § 1343(c)]" The regulations developed to implement § 1343(c) indicate that the Corps, in implementing its authority under § 1344(b), should consider "the nature and extent of present and potential recreational and commercial use of areas which might be affected by the proposed dumping," and the "presence in the material of any constituents which might significantly affect living marine resources of recreational or commercial value." 40 C.F.R. § 227.18(a) and (h). The example provided by the regulations of what should be considered is the "reduction in use days of recreational areas, or dollars lost in commercial fishery profits or the profitability of other commercial enterprises." 40 C.F.R.

§ 227.19. Thus, § 1344(b)(1), as implemented by the relevant regulations, indicates that the proper scope of the Corps' public interest inquiry is limited to the effects of impacts on the physical environment, such as the commercial or recreational value of areas directly affected by a change in the environment.

Section 1344(b)(2) also illuminates the proper focus of the Corps' economic inquiry. Section 1344(b)(2) provides that the Corps may issue a permit "in any case where [its] guidelines under § 1344(b)(1) alone would prohibit the [granting of a permit], through the application additionally of the economic impact of the site on navigation and anchorage." This provision has been interpreted "as justifying the Corps' approval of discharges at a site if environmentally preferable alternatives are

prohibitively expensive or pose a serious impediment to navigation." Rodgers, Environmental Law 406 (1977).

Section 1344(b)(2) has two pertinent implications. First, § 1344(b)(2) does not authorize denial of permits because of economic harms; it only authorizes issuance of permits because of economic benefits that override environmental harms. Rogers, supra at 202. Second, and perhaps more importantly, the terms of § 1344(b)(2) again indicate that the relevant economic considerations are those directly linked to the physical environment, such as navigation and anchorage.

The statutory language, legislative history, and regulations concerning Section 10 of the Rivers and Harbors Act reinforce the view reached by the court in analyzing Section 404. Indeed, as

Section 10 has evolved, it incorporates the public review standards applicable to Section 404, including the same limited authority to consider certain economic factors.

Section 10 does not expressly provide for a public interest review or list "economics" as a permissible criterion. Section 10 of the Rivers and Harbors Act of 1899 indicates that it was enacted to protect the federal government's interest in regulating the navigability of the country's waterways. See e.g. United States v. Logan & Craig Charter Service, Inc., 676 F.2d 1216 (8th Cir. 1982). The major concern of the legislation was obstructions in navigable waters that would interfere with interstate commerce on the waterways. California v. Sierra Club, 451 U.S. 287 (1981). Thus, the economic effects initially addressed by the

statute are those which relate directly to changes in the physical environment.

The subsequent evolution of Section 10 does not suggest an intention to authorize consideration of economic factors with a more attenuated relationship to changes in the physical environment. In the late 1960s, increased concern about protecting the natural environment led to an expansion by regulation in the Corps' review under Section 10. Deltona Corp. v. United States, 657 F.2d 1184, 1187 (Ct.Cl. 1981), cert. denied, 455 U.S. 1017 (1982); Power, supra, at 510. In 1968, the Corps revised its regulations to include "public interest review." Deltona, 657 F.2d at 1187. Public interest review included consideration of fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest. Id. The March

17, 1970 report of the House Committee on Government Operations explained this expansion:

The [Corps] which is charged by Congress with the duty to protect the nation's navigable waters, should, when considering whether to approve applications for landfills, dredging and other work in navigable waters, increase its consideration of the effects which the proposed work will have, not only on navigation, but also on conservation of natural resources, fish and wildlife, air and water quality, aesthetics, scenic view, historic sites, ecology, and other public interest aspects of the waterway.

H. R. Rep. No. 917, 91st Cong., 2d Sess. at 5 (1970).

This report indicates that although the interests to be considered under Section 10 are no longer limited to navigation, they are all directly related to impacts on the affected waterway.

In 1974, in order to "incorporate the requirements of new federal legislation" including Section 404, Deltona, 657

F.2d at 1187, the Corps' responsibility to conduct a public interest review under Section 10, among other provisions, was expanded to include "economics; historic values; flood damage prevention; land use classification; recreation; water supply and water quality." Id. See also Jentgen v. United States, 657 F.2d 1210, 1211-12 (CtCl. 1981)(sic), cert. denied, 455 U.S. 1017 (1982). Thus, since 1974, the Corps' public interest review under Both Section 10 and Section 404 have been governed by the same regulation which is now 33 C.F.R. § 320.4. As described earlier, analysis of Section 404 indicates that the scope of the economic inquiry under 33 C.F.R. § 320.4 is limited to effects proximately caused by changes in the physical environment.(sic) The foregoing analysis of Section 10 suggests the same conclusion.

The court's conclusion that in deciding whether to issue a permit the Corps may not properly consider economic factors unrelated to impacts on the physical environment is consistent with the rulings and dicta in the few reported cases addressing the economic component of the Corps' public interest review. The case most directly on point is the Court of Appeals for the Fifth Circuit's decision in Buttrey, 690 F.2d 1170. In Buttrey a developer of residential homes was denied a dredge and fill permit under Section 404 to channelize a half-mile stream in Louisiana. The plaintiff argued that the Corps should have considered the public benefit that would have flowed from about three million dollars in jobs to build the houses. The Court of Appeals, however, found that

"this is not the kind of 'economic' benefit the Corps' public interest review is supposed to consider." Id. at 1180.

Although contrary to defendants' contentions, the relevant dicta in Hough v. Marsh, 557 F. Supp. 74 (D.Mass. 1982) is compatible with the decision in Buttrey. Hough involved the Corps' issuance of a permit to build two houses and a tennis court on wetlands adjacent to Edgartown Harbor on Martha's Vineyard. The court found that the proposed construction would obscure, but not eliminate, the view of the nearby Edgartown lighthouse, an attraction on sightseeing bus routes. Id. at 86 and 87. After deciding a remand was necessary because the developer had not demonstrated the absence of practicable alternatives, the court addressed the question of economics. It stated:

To complete the discussion of the Clean Water Act, the court notes ... additional factors that the Corps failed to address properly in connection with the public interest review mandated by 33 C.F.R. § 320.4(a) With respect to [economics] ... the Corps did mention the positive anticipated impact of the proposal on jobs and municipal taxes but it sidestepped any consideration of adverse economic effects -- particularly ... the "elimination of an attraction (the Edgartown lighthouse) on the itinerary of sightseeing buses."

Id. at 86.

Thus, in Hough the court noted that construction on the particular property which implicated the Corps' jurisdiction would alter the physical environment, obstruct a scenic view and, as a result, have a cognizable economic effect on sightseeing bus operators. In contrast, in the present case the economic effects which the Corps deemed significant resulted from the mere existence of a mall

anywhere in North Haven. These effects did not derive from the potential impact of development on the physical environment which triggered the Corps' public interest review. Thus, Hough is factually distinguishable from the present case. The discussion of economic harms in Hough is, however, also compatible with the decision in Buttrey and this court's conclusion that only socio-economic harms proximately related to changes in the physical environment may be properly considered by the Corps in deciding whether to issue a permit.

This court's conclusion is reinforced by the reasoning and results of analogous cases involving NEPA. See Metropolitan Edison, 460 U.S. at 774; Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985).

In Metropolitan Edison the Supreme

Court addressed the question whether the Nuclear Regulatory Commission complied with NEPA when it did not consider the potential psychological health effects caused by activating a nuclear reactor at Three Mile Island. Although the case involved NEPA rather than Section 404, and the harm addressed was psychological rather than economic, the Supreme Court's reasoning and result is persuasive in the present case.

In Metropolitan Edison the Supreme Court explained by way of background that:

All the parties agree that effects on human health can be cognizable under NEPA, and that human health may include psychological health. The Court of Appeals thought these propositions were enough to complete a syllogism that disposes of the case: NEPA requires agencies to consider effects on health. An effect on psychological health is an effect on health. Therefore, NEPA requires agencies to consider the

effects on psychological health
asserted by [Metropolitan
Edison].

Metropolitan Edison, 460 U.S. at 771.

Then the Supreme Court wrote in reversing the Court of Appeals: "Although these arguments are appealing at first glance, we believe they skip over an essential first step in the analysis. They do not consider the closeness of the relationship between the change in the environment and the 'effect' at issue." Id. at 772.

In explaining its decision the Supreme Court emphasized that NEPA was "designed to promote human welfare by alerting governmental actors to the effect of their proposed action on the physical environment." Id. Thus, the Court found "[t]o determine whether [NEPA] requires consideration of a particular effect, we must look at the relationship between that effect and the

change in the physical environment caused by the ... federal action." Id. at 773. The Supreme Court indicated, however, that not even all "effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation [need be considered] ... because the causal chain [may be] too attenuated." Rather, the Court found that NEPA "included a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue." Id. at 774.^{6/} If not every effect resulting from a change in the physical environment is

^{6/}The Corps' public interest regulations themselves contain language familiar to proximate cause analysis. 33 C.F.R. § 320.4(a)(1) states "the benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments."

cognizable under NEPA, Metropolitan Edison makes it evident that effects unrelated to changes in the physical environment may not be considered under NEPA.

The present case is analogous to Metropolitan Edison. As discussed earlier, Section 404 and Section 10 are, like NEPA, concerned with the physical environment. When there is a reasonably close causal relationship between a change in the physical environment and economic factors, the Corps may consider those factors in its public interest review. Metropolitan Edison, however, indicates that the Corps may not properly consider and give significant weight to other economic factors in deciding whether to issue a permit pursuant to Section 404 or Section 10.

Similarly, once again contrary to defendants' contentions, the Court of

Appeals for the First Circuit decision in Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985), is also compatible with the conclusion that economic factors are cognizable by the Corps only if they are adequately related to impacts on the physical environment.

Sierra Club involved the question whether a cargo port and a causeway that Main planned to build at Sears Island would "significantly affect the environment" and, therefore, under NEPA, require an EIS. Id. at 870. The First Circuit found a "serious omission" in the Corps' decision not to require an WIS, namely the "failure to consider adequately the fact that building a port and causeway may lead to the further industrial development of Sears Island, and that further development will significantly affect the

environment." Id. at 877 (emphasis added). As the Court of Appeals later elaborated, the Corps had before it evidence that industrial development of the island would lead to "2,750 new jobs in a town with a population of under 2,500 ... increased traffic ... additional lost scallop beds and clam flats, more soil erosion and aesthetic harm, a need for additional waste disposal and water supply, an added threat to water quality" Id. at 880. Thus, in Sierra Club the evidence indicated that construction causing a change in the environment would cause industrial development which would further impact the environment in significant respects. It was not an economic impact alone -- but rather its relationship to the environment -- which the Corps was directed to consider.

Thus Sierra Club, like Metropolitan

Edison, suggests that there must be a reasonably close link between economic factors and the physical environment for the Corps to be legitimately concerned about those economic factors in performing its function under NEPA. Once again, a comparable conclusion is required when the Corps is operating under Section 404 or Section 10.

As described previously, the purposes and policies of Section 404 and Section 10, the relevant provisions of the statutes and regulations, and the case law all indicate that the Corps may not rely upon economic factors which are not proximately related to changes in the physical environment in denying a dredge or fill permit. Therefore, because the Corps gave significant weight to economic factors not related to changes in the physical environment in this case, its

decision was not in accordance with Section 404 or Section 10.

B. The Corp's (sic) Action is Not Authorized by NEPA.

The defendants contend that even if Section 404 or Section 10 does not authorize the Corps to give significant weight to the economic effect which a North Haven mall would have on New Haven in the context of this case, the NEPA statute itself provides the necessary authority. This contention, however, is incorrect.

Defendants' claim concerning NEPA relies primarily on two arguments. First, defendants rely on § 105 of NEPA, 42 U.S.C. § 4335 which states that "the policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal Agencies." See also Rodgers, Environmental

Law Air and Water 204 (it is "clear that the Corps' Section 10 authority was supplemented in some uncertain way by [NEPA]."). NEPA, however, "does not expand the jurisdiction of an agency beyond that set forth in its organic statute ... and the Supreme Court has characterized 'its mandate to the agencies [as] essentially procedural.'" Cape May Greene v. Warren, 698 F.2d 179, 188 (3d Cir. 1983) (quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978)); see also, Olmstead Citizens for a Better Community v. United States, 793 F.2d 201, 304 (8th Cir. 1986)("[NEPA], while embodying substantive goals for the preservation of our physical environment, imposes basically procedural obligations in pursuit of these goals.").

In any event, it is not necessary to

decide whether, or to what extent, NEPA enlarges the economic inquiry permitted the Corps because NEPA clearly does not authorize the reliance on the socio-economic impacts given significant weight by the Corps in this case. Metropolitan Edison was a NEPA case. As described earlier, it construed NEPA to authorize consideration only of harms proximately related to a change in the physical environment. That requirement is not met in this case.

The Supreme Court's decision in Metropolitan Edison also substantially disposes of defendants' second argument regarding the Corps' authority under NEPA. Defendants cite a series of pre-Metropolitan Edison NEPA cases which stated that: "When an action will have a primary impact on the natural environment, secondary socio-economic effects

may also be considered." Image of Gr. San Antonio, Texas v. Brown, 570 F.2d 517, 522 (5th Cir. 1978). See also Breckenridge v. Rumsfield, 537 F.2d 864, 866 (10th Cir. 1976); cert. denied, 429 U.S. 1061 (1977); Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972), cert. denied, 409 U.S. 990 (1972); Como-Falcon Coalition, Inc. v. Department of Labor, 609 F.2d 342, 346 (8th Cir. 1979) cert. denied, 446 U.S. 936 (1980); Nucleus of Chicago Homeowner's Ass'n v. Lynn, 524 F.2d 225 (7th Cir. 1975) cert. denied, 424 U.S. 936 (1980).

In Olmstead the Court of Appeals for the Eighth Circuit addressed the continued vitality of such cases. 793 F.2d at 206. Olmstead involved the proposed conversion of a mental hospital campus into a federal prison. As in this case, the proposed action would not have had

significant impacts on the physical environment. Id. at 206. In addressing the "oft -- quoted passage," stating that socio-economic effects are to be considered when the "action at issue has a primary impact on the natural environment," id., the Eighth Circuit stated:

[I]t is unlikely that such a distinction survives the recent Supreme Court holding in Metropolitan Edison. That decision ... was based on congressional intent, and there is no suggestion that Congress contemplated that the process it designed to make agencies aware of the consequences of their actions with regard to the physical environment would be converted into a process for airing general policy objections anytime the physical environment was implicated. Such a rule would divert agency resources away from the primary statutory goal of protecting the physical environment and natural resources, just as in Metropolitan Edison. See 460 U.S. at 776, 103 S.Ct. at 1562. Furthermore, courts even before Metropolitan Edison had commented on the anomaly of requiring that an agency consider impacts not

sufficient to trigger preparation of an ecological statement just because such a statement was required for other unrelated reasons. E.g., Citizens Committee Against Interstate Route 675 v. Lewis, 542 F.Supp. 496, 534 (S.D.Ohio 1982). Olmstead Citizens' concerns with crime and property values would exist regardless of any physical changes to the former mental hospital campus.

Id. The Eighth Circuit's reasoning is equally compelling in the instant case.

In addition, even if it were permissible for the Corps to consider unrelated socio-economic effects if the proposed project has a primary impact on the the natural environment, such consideration would not be appropriate in this case. Here, as in Olmstead, the primary impacts which concerned the Corps did not involve the physical environment. Rather, the Corps candidly stated that socio-economic effects "weighed most heavily" in its decision. ROD at 46.

Thus, the cases on which defendants substantially rely are inapposite even if their persuasive value is not, as the court finds, eliminated by Metropolitan Edison.

Finally, the court has particularly considered two cases upon which the defendants rely heavily. The first is Hanly in which the Second Circuit explained that the:

National Environmental Policy Act contains no exhaustive list of so-called "environmental considerations," but without question its aims extend beyond sewage and garbage and even beyond water and air pollution The act must be construed to include protection of the quality of life for city residents.

460 F.2d at 647. In Hanly, the Court of Appeals found that placement of a jail in a narrow urban area directly across the street from two large apartment houses presented problems of noise, fears of

disturbances, traffic problems and other "environmental considerations" within NEPA. The court then found the General Services Administration did not give adequate consideration to the factors relating to the quality of city life.

Although Metropolitan Edison apparently qualifies at least parts of the Hanly ruling, particularly the reliance on fears of disturbances, the close proximity of the jail to the apartment houses, and the court's focus on noise, traffic problems and other "environmental considerations" suggests that many of the harms in Hanly were proximately related to the change in the physical environment which would be caused by the construction of the jail. Thus, Hanly is factually distinguishable from the instant case.

The other case heavily relied on by the defendants is Dalsis v. Hills, 424 F.

Supp. 784 (W.D.N.Y. 1976). Dalsis involved the construction of an enclosed shopping mall in Olean, New York. The U.S. Department of Housing and Urban Development ("HUD") had funded demolition of substandard buildings on the proposed site and approved the mall.

Although the court found there was no need for an EIS, in reaching that conclusion the court engaged in an environmental analysis that involved socioeconomic considerations similar to those presented in the instant case. The court indicated that the harm to the environment would be "that excessive competition from retail stores in the mall would lead to blight and decay" in the form of boarded up stores driven out of business. Id. at 792. It appears that this harm might be too attenuated to be cognizable under Metropolitan Edison.

Nevertheless, there is another major difference between Dalsis and the instant case: the agency involved in Dalsis was HUD, while the agency involved in the instant case is the Corps. As the plaintiff states, "HUD's consideration of downtown business interests was necessitated by the dictates of its implementing statute; NEPA alone did not require such a result." Memorandum of Plaintiffs in Opposition to Defendant's Motion for Summary Judgment at 30. The court finds this distinction persuasive, although it recognizes the distinction is implicit rather than explicit in the district court's opinion in Dalsis. Drawing this distinction is consistent with the Supreme Court's conclusion in Metropolitan Edison that "the scope of the agency's inquiries must remain manageable if

NEPA's goal of 'insur[ing] a fully informed and well-considered decision' is to be accomplished." 460 U.S. at 776.

C. Conclusion Concerning Economic Considerations

As set forth previously, the most significant factor in the Corps' decision to deny Mall Properties its permits was the socio-economic harm to New Haven which the Corps perceived would result from a mall anywhere in North Haven. This harm was not proximately related to any impact the development would have on the natural environment. Thus, the Corps' decision was not in accordance with law.

It is elementary, but appropriate to note, that in our system of government, decisions concerning which competing constituency's economic interests ought to be preferred are traditionally made by

democratically accountable officials. The Corps seemed to recognize this when it concluded its lengthy review process by consulting the Governor of Connecticut concerning whether building a mall in North Haven was worth the risk to the economy of New Haven.

The statutes implicated in this case were enacted to protect the natural environment. Apparently the Corps was given a central role in this process because of its expertise in matters relating to our nation's waterways. There is no suggestion that it was perceived by those enacting the relevant statutes to have expertise concerning whether the economic interests of aging cities or their newer suburbs should as a matter of public policy be preferred.

This court is not now called upon to determine whether the delegation to a

group of military engineers of such broad, discretionary authority to determine public policy would be legally permissible, reasonable, or desireable. Rather, the court is called upon to discern statutory intent. As the Supreme Court noted in Metropolitan Edison, however, a broad grant of authority to the Corps to decide general public policy issues would require an agency to seek to develop expertise "not otherwise relevant to [its] congressionally assigned function." 460 U.S. at 776. This could cause "the available resources [to] be spread so thin that [the Corps in this case would be] unable adequately to pursue protection of the physical environment and natural resources." Id. In Metropolitan Edison the Supreme Court found it could not "attribute to Congress the intention to ... open the door to

such obvious incongruities and undesirable possibilities." Id. (quoting United States v. Dowd, 357 U.S. 17, 25 (1958)).

This court reaches the same conclusion in this case. The relevant statutes do not reveal an intention to empower the Corps to decide whether to issue permits based upon an assessment of economic effects unrelated to impacts on the natural environment. Nor do the relevant regulations reflect an intention to attempt to exercise such power. In the circumstances of this case the court will not attribute to Congress and the President the intention to delegate to the Corps the power to deny Mall Properties a permit because a mall anywhere in North Haven would, in its view, unduly injure the economy of New Haven while benefiting North Haven. Here, as in Metropolitan Edison, "the political process, and

not [Corps proceedings] provides the appropriate forum in which to air [such] policy disagreements." Id. at 777.

D. The Meeting with the Governor

The plaintiffs contend that the Corps did not act in accordance with law, but rather acted without observance of procedure required by law, when it failed to follow the procedures established by the relevant regulations relating to a meeting with the Governor of Connecticut. The Court agrees that the Corps did not follow the legally required procedures relating to the meeting. This too necessitates a remand.

On July 19, 1985 Colonel Sciple and William F. Lawless, Chief of the Regulatory Branch of the Corps, met with the Governor of Connecticut to discuss the position of the Governor on the construction of the mall. At that meeting the

Governor "indicated that he felt it was not worth the risk to New Haven of building the North Haven Mall." ROD at 47. On August 25, 1985, the Colonel issued his decision. The reference to the position of the Governor, expressed at their recent meeting, is the last factor mentioned before the Colonel stated that, "I have therefore concluded, that this project is contrary to the public interest and the permit is denied." Id.

The meeting between the Corps and the Governor was not itself prohibited as an ex . parte contact. 33 C.F.R. § 320.4(j)(3) provides that: "[a] proposed activity may result in conflicting comments from several agencies within the same state. Where a state has not designated a single responsible coordinating agency, district engineers will ask the

Governor to express his views or to designate one state agency to represent the official state position." Thus, the meeting itself was not improper.

An issue in this case, however, is generated by 33 C.F.R. § 325.2(a)(3), which states: "At the earliest practicable time, the applicant must be given the opportunity to furnish the district engineer his proposed resolution or rebuttal to all objections from other Government agencies." It is evident that the Colonel construed the Governor's comments as an objection to the proposed mall. It is undisputed that Mall Properties was not informed of the meeting or of the Governor's objection until after the final Record of Decision was issued. See Federal Defendant's Cross-Motion for Summary Judgment at 61.

The defendants claim, however, that

no notification was necessary because the Governor merely reiterated a position which the state, through the Office of Policy and Management, had previously expressed. Defendants claim the Governor provided the Corps with no new factual information. At most, they argue, the Corp's(sic) failure to notify Mall Properties of the meeting was harmless error.

It is not certain at this point precisely what the Governor told the Corps and whether any of it was new in substance. The regulation, however, does not distinguish between new and old information. It states the "applicant must be given the opportunity to furnish the district engineer his proposed resolution or rebuttal to all objections ... before final decision will be made on the application." 33 C.F.R. § 325.2(a)(3).

Nor can it be credibly claimed that

the Governor's comments were immaterial. The most important issue emerging from the Corps' lengthy public interest review was whether New Haven's interests ought to be preferred over North Haven's interests. As indicated earlier, this is the type of political decision traditionally made by a Governor of Connecticut. The Corps has no special expertise in this area. The Governor's position, even if only a reiteration of the Office of Policy and Management's position, might understandably carry special weight with the Corps.'

The Corps' decision was announced a month after it received the Governor's views and it followed them. The reference to the Governor's opinion in the penultimate sentence of the ROD indicates that the Governor had the last word and suggests that his objection to the mall was influential, if not decisive.

The relevant regulations required that Mall Properties receive notice of the Governor's objection so it could attempt to persuade him to revise his views or attempt to rebut any enduring objection. The Corps' failure to provide the legally required notice of the Governor's objection was not a harmless error.

E. Necessity for Remand

As indicated earlier, in denying Mall Properties a permit the Corps (1) improperly considered and gave the most significant weight to economic effects not proximately related to impacts on the physical environment and (2) improperly failed to give Mall Properties notice of the Governor's objection to the proposed mall. Each of these errors could have materially affected the Corps' decision whether to issue the permit. It is uncertain, however, whether the requested

permit would have been issued in the absence of either or both errors. In the course of this case Mall Properties agreed that remand to the Corps, rather than an injunction ordering issuance of a permit, would be the appropriate remedy if it prevailed. Remand to the Corps is now necessary and appropriate. See generally Faulker Hospital Corp. v. Schwieker, 537 F. Supp. 1058, 1071 (D. Mass. 1982), aff'd, 702 F.2d 22 (1st Cir. 1983); Quincy Oil, Inc. v. FEA, 468 F. Supp. 383, 387-88 (D. Mass. 1979).

III. ORDER

For the foregoing reasons, this action is hereby REMANDED to the United States Army Corps of Engineers for further proceedings consistent with this decision.

September 8, 1987 //s//

UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MALL PROPERTIES)
 Plaintiff,)
)
 v.) CIVIL ACTION NO.
) 85-4038-W
MARSH ET AL.,)
 Defendants.)

MEMORANDUM AND ORDER

WOLF, D.J.

May 12, 1986

Mall Properties ("plaintiff"), a developer of shopping malls, brought this action, seeking an order vacating the denial by the Army Corps of Engineers (the "Corps") of an application for permits under Section 10 and 404 of the Clean Water Act, 33 U.S.C. §§ 403 and 1344. The permits are required for the development of the proposed mall on a site in the town of North Haven, Connecticut located 10 miles north of the City of New Haven, Connecticut. The

plaintiff requests the order be vacated primarily on the ground that the Corps improperly considered economic factors in reaching the decision to deny issuance of the permits.

Three environmental groups -- the Connecticut Fund for the Environment, the Environmental Defense Fund, and the Conservation Law Foundation -- have brought a joint motion to intervene as defendants under Rule 24(a) or 24(b) of the Federal Rules of Civil Procedure. The City of New Haven has also brought a motion to intervene as a defendant under Rule 24. For the reasons stated below, the court hereby denies the environmental groups' joint motion to intervene and hereby grants the City of New Haven's motion to intervene.

The First Circuit requires that four

conditions be met to satisfy a Rule 24(a) motion to intervene:

To intervene of right under Rule 24(a)(2), the prospective intervenor must establish four conditions: (1) the motion was timely, (2) it has the requisite interest relating to the property or transaction which is the subject of the action, (3) the action may as a practical matter impair or impede its ability to protect that interest, and (4) its interest is not adequately represented by existing parties. Moosehead Sanitary District v. S.G. Phillips Corp., 610 F.2d 49, 52 (1st Cir. 1979).

United Nuclear Corp. v. Cannon, 696 F.2d 141, 142-43 (1st Cir. 1982).

The court finds that the environmental groups have not satisfied the requirements for intervention of right, because they have failed to show that the environmental interests they allege would be impaired or impeded by refusal to grant intervention. In the present action, the court will determine whether

the Corps exceeded its statutory authority by improperly considering economic factors in the decision. On this claim, the court could either affirm the Corps' decision or the court could remand the case to the agency.^{1/} In either case, the environmental interests which the proposed intervenors seek to protect would neither be impaired nor impeded. If the court affirms the denial, the environmental concerns would not be an issue. If the court remands, the environmental groups may present the environmental arguments to the Corps. Such argument will not be affected by the court's ruling on the "economics" issue

^{1/} Plaintiff has withdrawn its request for injunctive relief seeking issuance of the permit. Therefore, remand would be the appropriate remedy should the court find for plaintiff.

in this case. Thus, the court finds that the environmental groups have no right to intervene under Rule 24(a). See Wade v. Goldschmidt, 673 F.2d 182, 186 (7th Cir, 1982).

The environmental groups have presented an alternative request for permissive interventon(sic) under Rule 24(b). Permissive intervention is within the court's discretion. Rule 24(b) provides:

In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

These proposed intervenors seek to raise a cross-claim alleging that the Corps improperly considered environmental alternatives. This claim raises a complex question which would not otherwise be at issue in this action. The claim would become moot if the court were to affirm

the denial of the permits. Therefore, the court finds that were intervention to be allowed, the resolution of the original controversy would be unnecessarily complicated. For this reason, the court denies the environmental groups motion to intervene. See United States v. Massachusetts Maritime Academy, 76 F.R.D. 595, 598 (D. Mass. 1977).^{2/}

The court finds that the City of New Haven has met the requirements for intervention of right. The City of New Haven seeks to intervene under Rule 24 primarily to protect the economic interests the Corps allegedly relied upon in denying the permit. Therefore, unlike the environmental groups, the City of New Haven

^{2/} The court invites the environmental groups to participate in this case as amicus curiae on the issues raised by parties to this action.

is directly interested in the "economics" question which plaintiff has raised by this action. An adverse ruling by the court on this issue would limit the City's ability to protect its interests on remand.

Plaintiff argues that the Corps adequately represents the City's interests in this action. The City replies that the government may not represent its interest adequately, arguing that the government has a duty to protect the public interest, while the City seeks to protect its unique interests. The City has also outlined the history of disagreements between the Corps and the City which have arisen during the permit litigation before the Corps. The court also notes

that the Corps does not object to the City's intervention in this case.

In Trbovich v. Mine Workers, 404 U.S. 528 (1972), the Supreme Court found:

The requirement of [Rule 24(a)] is satisfied if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal.

404 U.S. at 538 n. 10. The court finds that the City of New Haven has made this minimal showing. Therefore, the City of New Haven's application to intervene must be allowed under Rule 24(a).

For the reasons stated above, the environmental groups' joint motion to intervene is hereby DENIED and the City of New Haven's motion to intervene is hereby GRANTED.

May 12, 1986

//s//
UNITED STATES DISTRICT
JUDGE

RECORD OF DECISION

SUBJECT: Application for a Department of the Army Permit (No. 13-79-561) by Mall Properties, Inc. to place fill in backwaters and wetlands adjacent to the Quinnipiac River in the Town of North Haven, Connecticut, in order to construct a regional shopping center, North Haven Mall.

U.S. ARMY CORPS OF ENGINEERS INVOLVEMENT: The filling of approximately 31 acres of wetlands and open water areas, some of which is tidal, triggers the involvement of the U.S. Army Corps of Engineers' Regulatory Program requiring authorization under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

BASIS OF DECISION: While Army involvement results from the proposed filling of

waters and wetlands, the decision is based upon a consideration of all factors affecting the public interest.

PURPOSE OF THE RECORD OF DECISION (ROD):

The purpose of this ROD is to provide a summarized record of the information used in this permit action.

1. Name of Applicant: Mall Properties
Application No.: 13-79-561
2. Purpose, location and character of the proposed mall:

a. The applicant's purpose for the proposed 1.1 million square foot, two floor, North Haven Mall, containing four major department stores (Figure 1), is to promote private sector business engaged in providing goods or services for profit. The public purpose of the proposal is to satisfy a need in the metropolitan New Haven area for retail

shopping that provides a concentration, variety and depth of shopper's goods, department store-type merchandise, apparel, and home furnishings, as well as a number of services and entertainment opportunities. The mall's principal market area would include the cities and towns of North Haven, New Haven, Wallingford, Hamden, North Branford, East Haven, Bethany, Woodbridge, Orange, West Haven, Branford, Guilford, Madison, Durham, Middlefield, Meriden and Cheshire. The applicant's proposal seeks to serve this unserved need by developing the North Haven Mall to provide a combination of anchor stores and a diversity of specialty stores.

b. The project site lies along the eastern bank of the Quinnipiac River in the north central portion of North Haven, Connecticut about 8 miles north of the

City of New Haven (Figures 2-5). It is located near interchanges to Interstate 91 (I-91) and the Wilbur Cross Parkway (CT Route 15), and lies directly adjacent to Valley Service Road and the Amtrak railroad line. Approach road alterations will involve another 6 acres of land.

PORTION OF ROD
INTENTIONALLY OMITTED

13. Conclusions:

a. Throughout our review of this project it has been apparent that a major concern is related to socio-economic impacts, in particular, those affecting the city of New Haven. There is no question that New Haven provides services and an environment for a community with a sizeable low to moderate income population. This population is less able to travel to reach services at other locations. It is more dependent upon a vibrant, viable city to provide services and a healthy, safe and desirable environment.

b. New Haven had been on the decline. Now however, there is a renewed confidence in New Haven as evidenced by the current major construction and rehabilitation projects and a continued committment (sic) by the United States Department of Housing and Urban Development to improve the Social and Economic

climate in the city. The city is experiencing a resurgence and private investors are making and fulfilling commitments. (sic) This turnaround and upswing is still fragile, though the degree of this fragility is subject to varying opinions. The construction of the North Haven Mall has the potential for drawing away some of the existing downtown businesses, but more significantly, those in the future that are important to the city's continued positive trend.

c. We acknowledge the demand for a facility such as the North Haven Mall to meet the desires of the market area. More Mobile shoppers would have a more convenient facility, the applicant would realize a profit and the town of North Haven would gain increased revenues. At the same time negative impacts on the quality of life in North Haven is an outcome some foresee.(sic)

d. A second important factor upon which this decision is based is the irretrievable loss of 25 acres of wetlands, 7 acres of which are particularly valuable in providing good wildlife habitat and food chain production.

e. A third factor is the cumulative(sic) impact from other past, present and reasonably foreseeable(sic) future actions affecting wetlands, floodplains and flooding.

14. I have considered all factors affecting the public interest, and after weighing favorable and unfavorable effects as discussed in this record of decision, I conclude that a greater public interest would be served by allowing New Haven to continue its revitalization without the inherent risk posed by the applicant's proposed mall. I therefore,

find it in the public interest, to deny
this permit.

15 Nov. '84

//s//

DEPARTMENT OF THE ARMY
NEW ENGLAND DIVISION CORPS OF ENGINEERS
424 TRAPPLO ROAD
WALTHAM, MASSACHUSETTS 02254

REPLY TO
ATTENTION OF
REGULATORY BRANCH

August 20, 1985

Mall Properties, Inc.
ATTN: Mr. Richard Steinberg
635 Madison Avenue
New York City, New York 10022

Dear Mr. Steinberg:

This refers to your application for a Department of the Army permit to place fill in waters and wetlands adjacent to the Quinnipiac River in North Haven, Connecticut for the proposed North Haven Mall.

This permit is being denied under Authority delegated to me by the Secretary of the Army and Chief of Engineers by Title 33, Code of Federal Regulations, Part 325.8 pursuant to Section 10 of the

Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

I have determined that the project is contrary to the public interest. In summary, I feel that the proposed mall would lead to adverse socio-economic impacts to the City of New Haven and contribute to flooding impacts. The enclosed Record of Decision provides the basis for my decision.

Sincerely,

//s//

Carl B. Sciple
Colonel, Corps of Engineers
Division Engineer

Enclosure

Copy furnished:
Mark Chertok
Sive, Paget & Riesel
425 Park Avenue
New York City, NY 10022

RECORD OF DECISION

SUBJECT: application for a Department of the Army Permit (No. 13-79-561) by Mall Properties, Inc. to place fill in backwaters and wetlands adjacent to the Quinnipiac River in the Town of North Haven, Connecticut, in order to construct a regional shopping center, North Haven Mall.

U.S. ARMY CORPS OF ENGINEERS INVOLVEMENT: The filling of approximately 31 acres of wetlands and open water areas, some of which is tidal, triggers the involvement of the U.S. Army Corps of Engineers' Regulatory Program requiring authorization under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

BASIS OF DECISION: While Army involvement results from the proposed filling of

waters and wetlands, the decision is based upon a consideration of all factors affecting the public interest.

PURPOSE OF THE RECORD OF DECISION (ROD):

The purpose of this ROD is to provide a summarized record of the information used in this permit action.

1. Name of Applicant: Mall Properties

Application No.: 13-79-561

2. Purpose, location and character of the proposed mall:

a. The applicant's purpose for the proposed 1.1 million square foot, two floor, North Haven Mall, containing four major department stores (Figure 1), is to promote private sector business engaged in providing goods or services for profit. The public purpose of the proposal is to satisfy a need in the metropolitan New Haven area for retail

FIGURE 1

SITE PLAN OF PROPOSED MALL

**North Haven Mall
Valley Service Road
North Haven, Connecticut**

shopping that provides a concentration, variety and depth of shopper's goods, department store-type merchandise, apparel, and home furnishings, as well as a number of services and entertainment opportunities. The mall's principal market area would include the cities and towns of North Haven, New Haven, Wallingford, Hamden, North Branford, East Haven, Bethany, Woodbridge, Orange, West Haven, Branford, Guilford, Madison, Durham, Middlefield, Meriden and Cheshire. The applicant's proposal seeks to serve this unserved need by developing the North Haven Mall to provide a combination of anchor stores and a diversity of specialty stores.

b. The project site lies along the eastern bank of the Quinnipiac River in the north central portion of North Haven, Connecticut about 8 miles north of the

City of New Haven (Figures 2-5). It is located near interchanges to Interstate 91 (I-91) and the Wilbur Cross Parkway (CT Route 15), and lies directly adjacent to Valley Service Road and the Amtrak railroad line. Approach road alterations will involve another 6 acres of land.

c. The proposed North Haven Mall is planned for construction on approximately 76 acres of a 118 acre site. It will require the filling of approximately 25.2 acres of freshwater wetland and 6 acres of open water (Figure 6). The following table presents a summary of the construction impacts by site characteristic and acres:

	Total	Impacted	Avoided
Mall Site	118	76	42
Upland	66	46	20
Wetland	42	25	17
Open Water	10	6	4

FIGURE 2

REGIONAL LOCATION

**North Haven Mall
Valley Service Road
North Haven, Connecticut**

FIGURE 3
SITE LOCATION

1" = 2,250'

**North Haven Mall
Valley Service Road
North Haven, Connecticut**

FIGURE 4
AERIAL VIEW OF SITE

1" = 1.125'

**North Haven Mall
Valley Service Road
North Haven, Connecticut**

FIGURE 5
CLOSE-UP AERIAL VIEW OF SITE

North Haven Mall
Valley Service Road
North Haven, Connecticut

FIGURE 6
WETLANDS-SITE PLAN OVERLAY

North Haven Mall
North Haven, Connecticut

The wetlands to be filled are comprised of wooded swamp (7.2 acres), shrub swamp (17 acres), and marsh (1 acre). The shrub swamp, marsh, and open water areas are man made, the result of quarrying, mining operations, and the creation of a drainage ditch. An additional 21 acres of wetlands and open water areas will remain unaltered. Wetland filling will support portions of the mall, parking areas and roadways. Fill will be clean material taken from the construction of an on-site detention pond and trucked in from other upland sources.

3. Applicable statutory authorities and regulations: Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344) as published in Title 33 CFR Parts 320-330 dated 22 July 1982 and CFR Parts 320, 323, 325 and 330 dated 5 October 1984.

4. Other Federal, State and Local authorizations obtained, required or pending:

a. Federal: A National Pollutant Discharge Elimination System (NPDES) permit is required for the stormwater being directly discharged into the river. This Federal permit process is administered by the Connecticut Department of Environmental Protection (CTDEP) on behalf of the Environmental Protection Agency (EPA). On 17 November 1982, CTDEP decided to approve the applicant's plans. If the stormwater treatement(sic) system is constructed in full compliance with the 1982 approval, CTDEP intends to issue a final NPDES permit.

b. State:

1) Water Quality Certification
- A water quality certification is necessary for the discharge of fill material

under the provisions of Section 401 of the Clean Water Act. The certifying agency in this case is CTDEP. Though they were informed of the project in 1979, CTDEP made a determination in the fall of 1983 that they did not have a valid request for such a certification. The applicant filed a formal request with CTDEP on 23 February 1984. Section 401 provides for a waiver of the certification requirement if the State refuses or fails to act on a request for certification within a reasonable time. Our regulations, Title 33 CFR, Section 325.2(6)(1)(ii), provide that the waiver will be deemed to occur sixty days after receipt of such a request unless we determine a longer period is reasonable. On 18 April 1984, we granted CTDEP an extension until 31 August 1984 to complete their water quality certification

action. This was later extended until 17 September 1984 due to processing delays encountered by CTDEP. Subsequent to our April action, the applicant filed suit against us demanding that the required certification be considered waived. This was filed in Federal District Court for the Southern District of New York, Mall Properties, Inc. v. John O. Marsh, No. 84 Civ. 2910 (CBM). A Water Quality Certification was issued by CTDEP on 17 September 1984.

2) Certificate of Operations - Construction of the mall's access roads will impact state highways through minor alterations and increased traffic. Therefore, authorization in the form of a traffic certification is still required from the Connecticut Department of Transportation (CTDOT) State Traffic Commission. Their application was made on 8 September 1978.

3) Indirect Source Permit - When plans for the North Haven Mall were first formulated, the Indirect Source Permit Program to assess air quality impacts then applied to shopping malls. Such a permit was granted by CTDEP Air Compliance Unit on 9 August 1976. The program now applies only to highways and airports.

c. Local:

1) Inland Wetlands Permit - A permit was issued for the mall on 19 September 1974 by the North Haven Inland Wetlands Commission. Following plan revisions, another permit was granted on 4 December 1978. On 26 February 1982 we received a further endorsement for the project from the Commission.

2) Site Plan Approval - The North Haven Planning and Zoning Commission must still review the specific site plans to determine their compliance with

the town's regulations. Following a public hearing on 13 November 1974, North Haven made numerous changes in their zoning regulations to provide for development of a regional shopping center.

3) Borrow Bank Approval - Sources of the fill material to be hauled to the site have not yet been determined. If there is a proposal to create a borrow bank within the Town boundaries, it will require Planning and Zoning Commission approval, a process that includes a public hearing and designation of haul roads and working hours.

4) Other - Other local approvals, such as a Building Permit and Subdivision Approval, will be required once a site plan is approved and construction is ready to begin.

d. Other:

1) In addition to approval by the State Traffic Commission, the Mall

1

Drive underpass will require the approval of Amtrak. In 1974, the Connecticut Public Utilities Commission approved the Town's application to construct the underpass. The plans were submitted to Amtrak in 1980 for review, but final approval has not been given.

5. Dates of application, public notice and public hearing and summary of objections:

a. Upon notification of Corps jurisdiction, an application was received from Mall Properties on 16 November 1979.

b. On 17 December 1979, we issued a public notice adequately describing the proposal and indicating that we had made a preliminary determination that an Environmental Impact Statement (EIS) was required.

c. In March 1980, we determined that an EIS was necessary and on 8 April

1980 we issued a Notice of Intent in the Federal Register notifying the public of our intent to prepare and issue a Draft EIS (DEIS).

d. Notice of the issuance of our DEIS was published in the Federal Register on 12 February 1982.

e. We conducted a public hearing on 16 March 1982 in North Haven to hear comments on the permit application and the DEIS. The hearing lasted two nights and approximately 1500 people attended.

f. Notice of the issuance of our Final EIS (FEIS) was published in the Federal Register on 26 August 1983.

g. Our public involvement process in this case, which began with our notification of the proposed project on 21 March 1979, has been both extensive and exhaustive. Over 9,200 comments, for and against, have been received in the form

of letters, post cards, form letters and petitions. Over 300 people attended several EIS scoping meetings we conducted in 1980 and 108 people spoke at our 1982 public hearing. We also participated in a radio talk and call-in show in New Haven in September 1983. In addition to being the subject of numerous television and radio newcasts,(sic) this project has been discussed in national retail magazines and hundreds of newspaper articles. On 9 September 1982, the U.S. House of Representatives' Environment, Energy, and Natural Resources Subcommittee held a hearing in Washington on our role in the preparation of the EIS and our review of the application/under Section 404. In addition to the above, we have corresponded and/or met with many groups including Stop the Mall/Connecticut Citizen Action Group, North Haven

League of Women Voters, Connecticut Fund for the Environment, Environmental Defense Fund, the Conservation Foundation, Connecticut Audubon Society, New Haven Downtown Council, New Haven Legal Assistance Associates, and numerous elected and appointed local, state and congressional officials. All comments received on the DEIS have been included, with responses, in the FEIS.

h. As a result of the numerous opportunities for area residents, government agencies, and the general public to express their views, we have received many objections to the proposed project. The major areas of concern are:

- 1) The effect the proposed fill would have on flooding.
- 2) The impacts associated with the loss of wetlands and open water areas.
- 3) Whether a mall is needed or

wanted, and how a mall would affect North Haven's character and social structure.

4) The increase in local traffic in some residential areas and congestion on access roads and at intersections.

5) The mall's potential economic effect on surrounding communities (particularly New Haven) if it is successful. This would include the impacts associated with the reduction in retail sales at other major retail areas such as the loss of jobs and taxable property and revenues collected.

6) The practicability of alternative sites and configurations.

7) Water quality impacts relating to the proposed detention pond.

8) The potential impacts to archaeological sites.

A discussion of these comments and areas of concern is contained in the paragraph below.

i. An additional area of controversy is the relationship of the preparation of our EIS and the proposed widening of nearby Bishop Street by CTDOT. This street has historical value and much mall related traffic would pass over it. Groups including the City of New Haven, Stop the Mall and the League of Woman Voters and many local residents have claimed that the Bishop Street improvements are necessary only to carry mall related traffic and that the expenditure of funds for widening is a decision favoring the mall over the historic values. Hence, they feel that we should have fully addressed the impacts related to the roadway widening through our EIS process.

Based on early coordination with the lead Federal agency, Federal Highway Administration (FHWA), and CTDOT, we determined that the Bishop Street project was

independent of the mall proposal. These agencies indicated that considerations to improve the street predated the planned mall and that modifications are needed even without the mall's presence. Through their own environmental review process, FHWA and CTDOT determined that the roadway improvements would not have a significant impact on the environment, hence, an EIS was not done. However, a review of the impacts associated with the Bishop Street project is discussed in the following:

- Environmental Assessment for the Proposed Widening of Routes 22 (Bishop Street) and S.R. 725 dated February 1980.

- Final Section 4(f) statement for the widening of Bishop Street and the Hartford Turnpike dated May 1983 approved by FHWA June 1983.

- Environmental Assessment and Finding of No Significant Impact for the widening of Bishop Street (Route 22) dated August 1983.

These documents were prepared jointly by FHWA and CTDOT. Under their jurisdiction and with their expertise, these agencies have developed the rationale to support decisions for conducting Environmental Assessments instead of EIS's. We find that they have adequately addressed the impacts of the roadway improvements and we see no reason to question their decision not to do an EIS. Nor did we find it necessary to develop a Supplemental EIS for this matter. Subsequently, CT DOT reported that their final Environmental Assessment and Findings of No Significant Impact dated August 1984 (a revision of the 1983 document) was approved by FHWA in September 1984.

In March 1984, the City of New Haven formally requested that the Council on Environmental Quality (CEQ) intervene in this matter pursuant to the regulations implementing the National Environmental Policy Act (NEPA) which determine which agency should be designated as "lead agency" for preparation of EIS's. CEQ responded concluding that their involvement would not be appropriate. They were concerned with both the timing and propriety of the City's request to appoint a lead agency. Section 1501.5 of the CEQ NEPA regulations was written to provide for the swift and fair resolution of a dispute among agencies over which one of them must take the lead in preparing an EIS for a particular proposal. CEQ noted that neither we nor FHWA had indicated a need for a joint EIS covering both the mall and the Bishop Street projects.

They indicated that Section 1501.5 of the CEQ regulations was not written to provide a means of resolving questions as to whether an EIS should be prepared, what the scope of a particular EIS should be, or similar questions. CEQ felt that in this particular instance, New Haven was asking the Council to intervene after two agencies had pursued the NEPA process at some length for two separate proposals, and to require them to do a joint NEPA review on the assumption that the two proposals are integrally related. The regulation in question does not envision such after-the-fact determinations on CEQ's part. It does provide for a means of early resolution of an interagency dispute. In this case, CEQ noted that it was not early and there is no interagency dispute.

6. Views of other Federal Agencies:

a. Environmental Protection Agency (EPA) - During the scoping process and our preparation of the EIS, EPA cooperated in the review of information related to a number of technical issues. These included surface water resources and water quality; storm water management; sediment and erosion control; ground water resources; air quality; noise impacts; vegetation, wildlife and wetlands; and alternatives.

EPA reviewed both our EIS and original public notice on the permit application in accordance with Section 309 of the Clean Air Act, the National Environmental Policy Act (NEPA) and Section 404 of the Clean Water Act. In a letter dated 26 September 1983, they indicated that, although a reduced scale mall and the no action alternative were clearly

environmentally preferable, the project as proposed would not cause unacceptable environmental impacts and that it, in their opinion, would comply with the 404(b)(1) Guidelines.

b. The Department of the Interior, U.S. Fish and Wildlife Service (F&WS) -

1) F&WS was involved with us in the preparation of the EIS as a cooperating agency in the areas of vegetation, wildlife and wetlands impacts, and the assessment of alternatives. Their Habitat Evaluation Procedures (HEP) Report for the project site was included as an appendix to the EIS.

2) Through a letter dated 31 March 1982 from the Dept. of the Interior, F&WS expressed its opposition to the project based on information in the DEIS and Section 404 (b)(1) Review. They

questioned whether there was a clear demonstration that no less damaging alternatives were available. They felt that the discharge of fill into the site's wetlands and waters will significantly affect aquatic ecosystem diversity, productivity, and stability by eliminating these values. They felt that additional mitigation is necessary to compensate for habitat losses. Subsequently, in July 1982, F&WS indicated that if we issued the permit over their objection they may seek elevation of the matter under our 1982 Memorandum of Agreement. The applicant, F&WS and ourselves continued to coordinate in the pursuit of additional on or off-site wetland mitigation although none was found at that time. A further discussion of mitigation is presented below. F&WS did not submit any additional comments on our Final EIS.

c. Department of Commerce, National Marine Fisheries Service (NMFS) - By letter dated 16 September 1983, NMFS indicated, after a review of the FEIS, that they have no comments since the proposed project should not significantly affect resources for which they have a responsibility.

d. Department of Housing and Urban Development (HUD) -

1) Prior to our receipt of an application, HUD requested that we prepare an EIS because of the potential impacts to the quality of the urban environment and the economic and social health of the New Haven area. They offered to assist us in the EIS preparation and the review of the permit application.

2) Primarily, this assistance came in the form of a 1980 Community Impact Analysis prepared by HUD's consultant, Rivkin Associates. This study,

included as Appendix R of the EIS, was done under former President Carter's Community Conservation Guidance program. This program was subsequently deauthorized by President Reagan. The study found that the permit should be denied because the adverse impacts to the region would outweigh the benefits of the mall to the region. However, it was noted in the document that its information was limited to that available as of April 1980. It did not consider the necessary analysis of retail sales inflows and outflows to the market area. Accordingly, this preliminary analysis recommended that our EIS give further consideration to the mall's potential to reduce New Haven's retail sales. Our EIS acknowledges that there will be a substantial impact to the city's downtown retail core.

3) On 25 March 1982, in response to our DEIS, HUD stated that our study had considered and taken into account the specific findings and conclusions of their Community Impact Analysis.

4) In the Housing and Community Development Act of 1974, as amended, Congress declared it the policy of the United States that, among other things:

"the future welfare of the Nation and the well-being of its citizens depend on the establishment and maintenance of viable urban communities as social, economic and political entities, and require -- systematic and sustained action by Federal, State and local Governments to eliminate blight, to conserve and renew older urban areas, to improve the living environment(SIC) of low- and moderate-income families; and to develop new centers of population growth and economic activity;"

Congress also stated that the "primary objective [of this Act] is the development of viable urban communities by providing decent housing and suitable living

environment and expanding economic opportunities, principally for persons of low and moderate income". Consistent with the primary object, Congress declared that Federal assistance should be directed toward the following objectives, among others:

"a more rational utilization of land and other natural resources and the better arrangement of residential, commercial, industrial, recreational and other needed activity centers; and the reduction of the isolation of income groups within communities and geographic areas..."

An important mechanism for meeting these objectives is the Urban Development Action Grant (UDAG) which HUD may make "only to cities and urban counties which have.... demonstrated results in providing housing for low- and moderate-income persons and in providing equal opportunity in housing and employment for low- and

moderate-income persons and members of minority groups." Its aim is to "create permanent private sector jobs for low and moderate income persons, tax base for the community, and leverage private sector investment."

5) New Haven is the seventh poorest city (those over 100,000 population) in the United States based on the percentage of population below the poverty line. 23% of its housing stock is state or federally subsidized. HUD maintains a list of distressed urban cities and counties to determine funding eligibility and to assist them in prioritizing the funding allocations. HUD considered New Haven to be one of the most distressed small cities on their list of distressed communities and they indicated that New Haven competes well for funding. Of the approximate 800 urban cities

and counties eligible for funding consideration, 413 pass the threshold as being considered distressed. New Haven is the 36th most distressed out of the 413 based on factors such as population below the poverty line, age of housing stock and population growth. For example, 23.5% of its population is at or below the poverty line, whereas, the average for other distressed communities is 16%; 52% of New Haven's housing stock was built prior to 1940, whereas, the average is 37%; and their population growth since 1960 has declined by 17% while the other distressed cities have increased by 9.5%.

6) In a letter dated 5 December 1984, HUD presented us with a general overview of their grant programs in New Haven and their thoughts on the mall's impact:

a) They indicated that since the inception of the Community Development Block Grant Program in 1975 and subsequent UDAGs, over \$108 million in grants have been awarded to New Haven to assist in its social economic revitalization efforts. These two major funding programs have continued New Haven's progress initiated under the former Urban Renewal Program during which over 300 million dollars was used for acquisition, new construction and revitalization efforts on a city-wide basis. HUD feels that a degree of economic stability has been realized but New Haven still [_____] economic, social and [fiscal] difficulties. Revitalization activities are being continually expanded in an effort to strengthen its social-economic well being which is tied directly to a viable residential and retail environment reflecting

a balanced racial and economic mix. HUD notes that success will be ultimately realized as long as investment continues to surpass disinvestment.

b) HUD stated that the mall would have a major impact on New Haven's still fragile economic revitalization with all federal efforts being jeopardized by substantial and long lasting effects. They feel that the most direct and profound effects would be that on retail trade, employment, social exchange and the quality of physical appearance in New Haven's Central Business District and supporting neighborhood commercial(sic) and service centers. Such diversion of both customers and tenants away from their current locations would create a slow growth condition and make replacement difficult and more often impossible. The resulting vacancies sustained over an extended time would very

likely accelerate deterioration in physical appearance and maintenance, further loss of business, more vacancies and a blighting influence on New Haven and surrounding communities. Finally, HUD feels that the "ripple effect" throughout New Haven's economy could reduce the tax base and its capacity to provide essential services, subsequently increase tax rates, further depress property values and set back revitalizations efforts to the early 1950 levels.

7) Currently, it appears that private sector investment, with Federal assistance through the UDAG program, is the primary means for New Haven to continue to revitalize its urban base and provide adequate public services. Their continued willingness to provide funds, demonstrates HUD's commitment to improve the social and economic climate of New Haven.

e. Federal Emergency Management Agency (FEMA) -

1) FEMA has been involved with this permit application as a cooperating Federal agency since early 1981 to assess flooding related issues. In response to our DEIS, they stated they had no major objections to the techniques used or the results presented in the document to address the effects of the project itself on flooding, relating to both reduction of conveyance and the effects of loss of valley flood storage volume. However, FEMA noted that the reduction of flood plain storage volume should be avoided where possible. They felt that even if the mall could be shown to have no measurable impact on flooding, the cumulative impact of reduction of storage could increase flood peak discharges and flood levels throughout the river basin.

They concluded that we should examine alternative plans that would reduce the flood plain fill. A further discussion of the flooding issue is presented below.

2) Flooding information in the DEIS was based on data and findings determined under FEMA's Flood Insurance Study for North Haven. On 6 June 1982, the North Haven area experienced serious flooding along the Quinnipiac River, including the proposed mall site. We analyzed this flood event and found some deviation from the previously calculated flood elevations determined under the FEMA study. Our analysis indicated that previous flood levels were underestimated by approximately 2.5 feet. Following a review of our analysis, FEMA indicated that the Flood Insurance Studies for all affected communities along the Quinnipiac should be revised using the updated statistical data. This was done, and in

November 1983, FEMA issued a proposed revised Flood Insurance Study for North Haven. The relationship of the results of this study to the mall project are discussed below. The site again experienced flooding in late May 1984. This event was analyzed and is also discussed below.

f. U.S. Department of Agriculture, Soil Conservation Service (SCS) - SCS was asked to review the erosion and sediment control plan for the project and other information for the EIS such as impacts related to geology, groundwater, soils and topography. They felt that the final detailed control plan should be coordinated with themselves and the New Haven County Soil and Water Conservation District and that similar plans should be developed for borrow areas. Generally, they indicated that if these measures

were worked out and properly implemented, there should be no serious sediment and erosion problems as a result of the project.

g. U.S. Department of Transportation, Federal Highway Administration (FHWA) - In addition to our coordination over the Bishop Street project as noted above, FHWA compared our DEIS with CTDOT's Environmental Assessment. FHWA found a good correlation between the two documents and concluded that construction of the mall would not have a significant adverse impact on proposed Federal-aid highway projects in the area.

h. Advisory Council for Historic Preservation (ACHP) and National Park Service, Keeper of the National Register (Keeper) - During the preparation of the DEIS, we determined that three archaeological sites in the permit area were

eligible for listing in the National Register of Historic Places. We also determined that they would be adversely affected by mall construction. The Keeper concurred with our eligibility determination and the ACHP agreed with our determination of effect. Both agencies recommended recovery of any artifacts. A full discussion of this issue is contained below.

i. Congressional Interests -
Throughout our process there has been involvement with the Congressional interests representing Connecticut. This was highlighted by former Connecticut Congressman Tobey Moffett's 9 September 1982 hearing before the Environment, Energy, and Natural Resources Subcommittee of the House Committee on Government Operations. The purpose of this hearing was to hear testimony on our role in the permitting of the mall. Representatives of

the Army's Office of the Chief of Engineers, Mr. Curtis Clark and Mr. Lance Wood, attended the hearing. After indicating that the Assistant Secretary of the Army (Civil Works), Mr. William Gianelli, had concerns with the potentially serious legal difficulties of a Congressional hearing on a pending permit action, we participated in a discussion of such issues as:

- 1) Our committment(sic) to uphold the provisions of Sec 404 of the Clean Water Act - We clearly stated that we are fully committed to carry out the letter and spirit of the regulations that govern 404 permit actions.

- 2) Our procedures to independently evaluate studies submitted by the applicant for our EIS and our responsibility to provide our own judgement(sic) of whether a permit is in the public interest - This was a significant area of

controversy with views presented by Subcommittee members and our own representatives. It was agreed that is our responsibility(sic) to provide a full independent analysis of the technical studies submitted to us by the applicant's consultants. During the hearing, statements we had prepared previously regarding this issue were submitted for discussion. We indicated that we had taken the responsibility to exercise care in the review and evaluation of any data submitted by the applicant. We agreed that we had to ensure that the information was accurate and valid and we were sensitive to the possibility of biased information. To assist us in obtaining information and conducting our independent review, we used our own internal experts and solicited the aid of private contractors and other cooperating agencies who possessed the expertise or

jurisdiction in appropriate areas of concern. For example, we used our hydrology/hydraulics elements and FEMA to consider ponding and flooding; HUD and private consultants to consider socioeconomic impacts; EPA to consider air/water quality and wetland issues; and F&WS to consider ecological impacts and to provide the Habitat Evaluation Report. Information received from mall opponents was considered and used when it was substantive and could be verified and referenced for public review. When critical comments were submitted by the opponents, our staff, or other Federal State and local agencies, we considered them on their merit and requested additions and/or clarification from the applicant when it was necessary.

3) The relationship of the EIS and the North Haven Mall permit decision

- We explained that the EIS is not a decision document. In reaching a decision on an application, the EIS is considered as one body of information among many. It is not intended to be the only factor considered in the review, nor is it the determining factor. The decision on issuance of a permit is based on the full public interest review contained in the ROD.

The entire record of this hearing is contained in the administrative file for this decision.

7. Views of State Authorities:

a. By letter of 9 March 1982, Governor William A. O'Neill advised us that his various state agencies would review our EIS and comment in their particular areas of responsibility and expertise. Though the Governor has taken no position for or against the mall, he did indicate

during a meeting with us in July 1985 that he felt it was not worth the risk to New Haven of authorizing the mall.

b. Connecticut Legislators - We have received correspondence from Senator Robertson and Representatives Luppi and Abercrombi in support of the mall. Senator Daniels and Representatives Berman, Thorp, McCluskey, Mushinsky, and Strolberg have all expressed their concerns over the project relating to flooding, social and economic impacts.

c. Connecticut Department of Environmental Protection (CTDEP) -

1) CTDEP limited its comments to environmental impacts; however, they noted that the economic impacts appeared to be more significant than any to the natural environment. In a letter dated 30 March 1982, they indicated that no major adverse environmental impacts

should occur. Also, as noted above, a NPDES permit and WQC are required from CTDEP. At the time, they stated that these two applications would be processed concurrently, and that preliminary analysis showed that the mall would have no significant impacts to water quality in the lower Quinnipiac.

2) They questioned the design of the stormwater detention pond and its dual role as providing a spawning area for anadromous fish. We responded that the proposed culverts have been sized and located to permit normal flows between the pond and the river. Under flooding conditions, however, they will detain flows entering the pond and cause retention of some floodwaters. Also, the placement of the culverts through the berm will permit flow between the river and the pond under normal water elevations, allowing passage for fish between

the two water bodies. Both functions can be adequately served without compromising the retention function. The habitat value gained will be worthwhile.

d. Connecticut Office of Policy and Management, Comprehensive Planning Division (CTCPD) -

1) In response to both the Draft and Final EIS, CTCPD indicated that mall construction is inconsistent with policies and/or plans contained in:

a) Executive Order 20 issued by Governor Ella Grasso on March 9, 1978 - This order defines the priority urban goals of the State. CTCPD feels that the project would contravene the order's first goal which is to "revitalize the economic base of our urban areas by rebuilding older commercial and industrial area, and encouraging new enterprises to locate in the central cities in

order to protect existing jobs, and create new job opportunities needed to provide meaningful economic opportunity for our inner city residents."

b) 1982-1985 Conservation and Development Policies Plan - This advises that new retail centers should be developed only where justified by population and sales growth and in areas not already served by existing centers with similar variety and scale of stores. They feel that several existing retail centers when taken together provide the proposed level of services. They also related this project to guidelines for state or state supported development which discourage construction in flood fringe areas.

2) CTCPD in conclusion found that the mall was contrary to State urban policies and the permit should be denied.

e. Connecticut Council on Environmental Quality (CTCEQ) - In its role as a "watchdog" and "Ombudsman" for environmental protection concerns, CTCEQ provides advice to various state agencies. As early as May 1979, this council asked us to prepare an EIS. They have monitored the progress since and they indicated that the economic issues had been given too much weight in our deliberations. They felt that such issues as energy consumption and impacts to the Quinnipiac needed further attention. Following publication of the FEIS, CTCEQ reiterated their previous concerns indicating that our study was lacking in its discussion of impacts to wetlands, groundwater, water quality and vegetative diversity. They felt we understated the economic and transportation impacts, and that we did not fully address the no-action alternative.

f. Connecticut Department of Health Services - This Department is concerned about the addition of new sources of air pollution in the project area. Though new sources of air pollution are being added, air quality standards are expected to be maintained. Air quality impacts are discussed below and more fully in our EIS. They also felt that siltation should be controlled and that, if it is needed, a sewer pumping station should be built above the 100 year flood level.

g. Connecticut Department of Agriculture - Aquaculture Division - In January 1980, this Department recommended that the permit be denied because of the potential degradation of water quality with its resulting adverse impacts to oyster seed beds downstream in New Haven Harbor. In response to the DEIS, they reiterated their concerns and asked that

an adequate sedimentation and erosion control plan be implemented and that no work be performed in the Quinnipiac watershed area between 1 June and 30 September to protect spawning shellfish. This project will be subjected to an adequate control plan. Since there is no work in the river to significantly stir sediments and cause increased suspended solids, there does not seem to be any need to require seasonal constraints.

h) State Historic Preservation Officer (SHPO) - In response to our 1979 public notice, the SHPO noted the potential for the existence of archaeological sites within the mall permit area. They requested that a reconnaissance survey be done. As a result, three sites of significance were discovered and found to be eligible for National Register listing. On 24 October 1983, following a review of

a draft plan for the mitigation of these three sites, the SHPO indicated that we would meet our responsibilities in accordance with the National Historic Preservation Act, provided the plan is undertaken.

i) Connecticut Department of Transportation (CTDOT) - As noted above, CTDOT has stated that the proposed widening of Bishop Street, Route 22, is independent of the proposed mall development. Their studies have shown that widening is required to accommodate future development in the area even if the mall is not built. They had no specific comments on the proposed mall itself.

8. Views of Local Authorities:

a. Town of North Haven - From the start of our involvement, North Haven elected officials and agencies have consistently supported the North Haven

Mall. The strongest endorsements have come from the Office of First Selectman, Walter Gawrych. Other local authorities which have supported this project include:

- 1) Board of Finance
- 2) Engineering Department
- 3) Planning and Zoning Commission
- 4) Fire Chief
- 5) Economic Development Commission
- 6) Department of Parks and Recreation
- 7) Inland Wetlands Commission
- 8) Conservation Commission
- 9) Police Chief
- 10) Tax Assessor

No known local permits have been denied for this project, though minority opposition opinions have been expressed by members of the Board of Selectmen,

Inland Wetlands Commission, Conservation Commission, and Board of Finance.

b. City of New Haven - Just as North Haven officials have consistently endorsed the project, the City of New Haven has been relentless in its total opposition. Their opposition has been led by the Mayor's Office (currently, Mayor Biagio DiLieto) from initially insisting that we conduct an EIS to them stating that our EIS process was inadequate. The City, through the Development Administrator, Board of Aldermen, Office of Economic Development, Office of Downtown and Harbor Development, and the New Haven Downtown Council, has raised numerous concerns and has presented us with much valuable information to assist in our review process. Most of their concern centers around the issue of economic impacts. They feel that the mall would

be a devastating blow to the revitalization of downtown New Haven, the historic retail and cultural center for the region. Through continued coordination with us, the city has presented numerous concerned opinions such as:

1) Downtown New Haven is a viable alternative over a regional shopping mall in North Haven for the provision of retail services.

2) Impacts to the minority residents in New Haven.

3) If businesses close, there will be a growing influx of retail stores catering to a lower income population, thereby throwing off the downtown social balance.

4) That New Haven, as the regional focal point, would be crippled by the mall, and its capacity to provide the facilities and services for the whole region would be undermined.

5) The mall would lead to a transfer of 16-20% of sales from downtown New Haven and an immediate closing of 20% of the stores in downtown New Haven as well as Sears in Hamden and many smaller stores in Hamden, Wallingford, and other established centers. This transfer of sales will seriously undermine the tax and employment base of hard-pressed communities. New Haven could lose up to 1.1 million dollars per year. Moreover, the proposed Mall would produce no net gain in regional employment or in tax revenues.

6) This proposal would not only foreclose forever opportunities to maintain and revitalize existing centers, it will set off a cycle of decline which cities and towns will be powerless to reverse.

7) The economic impact created by this proposal would seriously reduce

the attractiveness of the entire region as a location for new office and industrial development.

The majority of the city's concerns are addressed in the discussion of various factors below.

c. Other Municipalities - Several other surrounding communities have commented on the project such as:

1) Town of North Branford - The Mayor of North Branford indicated his support of the mall's construction at our hearing.

2) Town of Guilford - The First Selectman and Economic Development Commission expressed neither support or opposition, but indicated at our hearing that North Haven residents should be able to direct their own future without outside interference.

3) Town of Woodbridge - By

letter of 23 March 1982, the First Selectman suggested that our decision should not be affected by economic and emotional fears.

4) Town of Wallingford - By letter of March 25, 1982, the Wallingford Conservation Commission stated their opposition to the mall because of impacts to flooding, wetlands, green space and water quality.

5) Town of Hamden - The town did not take a position for or against the mall because they believe it to be inappropriate for one community to seek to influence potential economic competition in another. However, their Economic Development Commission did present several comments regarding the economic studies in our EIS. The Hamden Office of the Legislative Council recommended that we deny the permit because the mall would be

an economic and ecological disaster.

9. Views concerning probable effects of the proposed work on:

a. Navigation:

1) Based on our Navigability Study of the Quinnipiac River, the river is considered navigable and tidal to mile 13.5. The mall site is located at mile 12.11, hence, under our jurisdiction pursuant to Section 10 of the River and Harbor Act.

2) In the traditional sense, the Quinnipiac at this point does not serve as a navigable waterway. Only small craft such as canoes would be able to traverse this waterbody. Since no work will take place within the river, there will be no impacts to its capacity to support small recreational boats.

b. Flooding:

1) Early in our process we

became aware that flooding would be one of the significant issues surrounding our review. Hence, it has been studied to a great degree. The majority of the project site, located in the Quinnipiac River floodplain, is within a Special Flood Hazard Area inundated by a 100-year flood event. Therefore, the applicant has designed his project in an effort to minimize flooding impacts.

2) The applicant's site plan and our initial review in the DEIS was based upon data and findings determined under FEMA's 1980 Flood Insurance Study. It indicated that the 100-year flood elevation would be 12.7 NGVD at the mall site. For our DEIS we used a more conservative estimate of 13.6' based on potential developable land and tidal influences not accounted for by FEMA. The first floor elevations for the mall

buildings are planned for 16'. As noted above, we performed a hydrologic analysis of the June 1982 flood, an event when most of the site was flooded. Our analysis indicated that this storm approximated a 200-year event and that the 100-year flood elevation would be more nearly 16' under normal tide conditions and up to 17' NGVD if the 100 yr. discharge were to occur coincident with a Long Island Sound storm tide. Subsequently, FEMA has published a preliminary revised Flood Insurance Study, dated November 1983, which showed that the 100-year flood elevation was just under 15'. This study is still undergoing internal agency review, hence, FEMA has not published their final flood elevations. Our 100-year level is higher, primarily because we allowed for normal tidal effect in our calculations. FEMA agreed with our discharge frequency

calculations at the site and our designation of the 1982 flood as a 200-year event. The comparative flood studies, reported in Appendix F of our EIS, were also performed using 2, 10, 50 and 100-year frequency floods based on FEMA's 1980 Flood Insurance Study. using our post 1982 flood frequency update, including a partial duration analysis, the former 2-year flood is more nearly an annual event, the 10-year more nearly a 5-year, the 50-year more nearly a 10-year, and the former 100-year more nearly a present day 50-year flood.. Though the test floods are more frequent then(sic) originally indicated, the comparative flood studies remain relevant.

3) For our analysis of the 1982 event, we performed a review of peak discharge frequencies on the river using the then available 52 years of flow data

recorded by the U.S. Geological Survey at Wallingford, CT. The annual peak flows were statistically analyzed using a Log Pearson Type III distribution and a frequency curve was developed for the Wallingford gage which indicated a 1 percent chance (100 - year) flow of 7,000 cubic feet per second (cfs). In late May 1984, another moderately high flow was experienced on the Quinnipiac. Therefore, we did another review of the discharge frequencies at the Wallingford gage. We used the same Log Pearson Type III statistical analysis for a 54-year period with a peak flow of 3,870 cfs for 1983 and the 31 May experienced flow of 3,670 cfs for 1984. The updated curve was nearly identical to the previously developed 1982 curve. The 1 percent (100-year), 2 percent (50-year) and 10 percent (10-year) frequency floodflows at the

gage remain 7,000, 6,000, and 4,000 cfs, respectively. The late May 1984 freshlet flow on the Quinnipiac was not the result of high intensity rainfall but a persistent storm extending over a 4-day period. This storm was widespread resulting in a major flood event on the lower mainstem of the Connecticut River, but in general was of less severity on the smaller streams. The experienced 31 May peak flow of 3,670 cfs on the Quinnipiac at Wallingford represents a flow with an estimated 12 percent (8-year) annual chance of occurrence. River levels in the vicinity of the North Haven Mall site during this recent event reportedly ranged from 11.9 to 12.7 feet NGCD. This elevation is in agreement with the elevation discharge relationship developed for the site in the past June 1982 flood review.

4) Impacts discussed in our FEIS and these findings are based on our, more conservative 100-year flood elevation of 16'. However, as past analyses illustrate, the 1 percent (100-year) flood level is not necessarily constant with time, nor is its determination an exact science. The statistical determination of the 100-year discharge becomes more refined with increasing numbers of years of flow records, but peak discharge rates can also change with time due to changing runoff conditions in a watershed. Further, the hydraulic capacity characteristics of a natural river channel can vary with time resulting in either an increase or decrease in flood levels, and the extent of debris build up in a channel is a highly unpredictable nemesis that can affect flood levels for any given high flow event. Lastly it is

noted that the 1 percent chance (100-year) flood has no particular significance as an appropriate regulatory flood level except that it has been widely adopted and issued in the National Flood Insurance Program as the minimum level of flooding to be used by communities for flood plain management regulations.

5) The mall's impacts on flooding can be viewed in two ways:

a) The potential impact of the project on flooding in the river and the surrounding flood plain - Mall construction would cause a net loss of volume of temporary onsite storage of floodwaters of up to 291 acre-feet for a 100-year flood. Our analysis shows that this loss of volume would not increase peak flood flows in the river because of the small volume of storage available at the site relative to the total volume of

the flood. It also shows that the mall would have no reassurable impact on flooding in the river, not only because of the sites relatively small storage capacity, but because of the earthen berm along the river. This berm, which separates the mall site from the river channel, or conveyance way for floodwaters, is higher than the 16' elevation. Therefore, the site continues to be a back-water area during floods and not a conveyance way that would be blocked by filling. The capacity of the Quinpiac's conveyance way will remain the same with or without the mall.

b) The potential impact of flooding on the mall itself - Lower-level parking lots in the site's northwest and southeast quadrants would have more extensive flooding than originally estimated. We found that a 10-year flood

event would begin to back water into some of the lots and based on the frequency and magnitude of high flows in recent years, the threat of backwater ponding could be expected almost annually. To prevent damage to property and possible personal injury, the applicant proposes to implement a Flood Emergency Management Plan to monitor potential flooding and evacuate the lower lots when flooding is probable. Details of this plan are contained in the Appendix Supplement of the FEIS. Floods greater than the 100-year event could have a significant impact on the mall, its inventory and operations given the mall's present first floor design elevation. Based on our damage survey of a similar mall within New England, recurring losses from a 200-year event (such as the June 1982 flood) could be expected to be in the \$8-12 million

range. Due to the infrequent nature of floods which would have an impact on the mall itself, expected annual losses would approximate \$40,000 to \$60,000. Since this mall would be constructed subsequent to the establishment of the Flood Insurance Rate Map for North Haven, any flood insurance under the National Flood Insurance Program would be at actuarial or true risk rates. There would be no federal subsidy for such policies.

6) With regard to stormwater drainage, the proposed detention pond would reduce the rate of flow currently entering the river from the site and from areas draining through the site for all but the smallest storms. River flooding would not affect stormwater discharge from the pond because the peak discharge from the mall site would generally precede the peak flow in the river.

7) In accordance with Executive Order 11988, we should avoid floodplain developments whenever practicable. As demonstrated below and in our EIS, practicable alternatives do not exist in this case. To some extent, the impacts of potential flooding on human health, safety and welfare and the risks of flood losses(sic) will be minimized through implementation of the applicant's Flood Emergency Management Plan. Also, through the design of its detention pond and because of the site's minor flood storage role, the beneficial values of floodplains will not be compromised. Whether our or FEMA's elevations are used, the effects from placing fill for the mall would itself cause no measurable change in flooding conditions. Although this particular floodplain alteration may constitute only a minor change, the cumulative impact of such changes throughout a

river basin may result in a significant degradation of floodplain values and functions and in increased potential for harm to upriver and downriver activities. There are no all-purpose rules that can be applied regarding floodplain alterations. However, as a general policy and in accordance with the Executive Order, we are opposed to the progressive filling of floodplains. Though authorization of a project in a floodplain could be construed as setting a precedent for unrestricted filling on a regional basis, our policy is to review each case, not only with regard to its potential hydrologic impacts, but its environmental, social and economic trade-offs and impacts as well. Since, we only have control/jurisdiction over those floodplain activities that involve waterway or wetland filling, there is always the potential for floodplain alterations that

would not be subject to our public interest review.

c. Fish and Wildlife:

1) Fish -

a) Placement of fill in the existing ponds on site would result in the mortality of some aquatic organisms. No resource of significant human or economic value would be affected, nor would the integrity of the resource be affected in the region. The detention pond has been designed to mitigate the partial loss of some spawning area for anadromous fish, such as herring, by allowing for the free passage of fish to and from the river. The river's aquatic communities are not expected to be affected by mall construction or operations. In particular, the identified areas of soft-shelled clams and oysters near the mouth of the Quinnipiac River

would not be affected by suspended solids generated by the proposed development. The implementation of the stormwater management plan and the sediment and erosion control plan would result in fewer suspended solids being contributed to the river than occurs under existing conditions.

b) With regard to the proposed detention pond, anaerobic conditions will develop in its deeper waters resulting in generally poor habitat in its lower depths and along the bottom. The surface waters will remain oxygenated, offering a greater volume of water habitat than that provided by the existing ponds. Construction of the mall and pond should not alter the reproduction and growth of fish from the current conditions.

2) Wildlife -

a) Vegetative diversity is a significant factor in assessing wildlife habitat impacts of the nine vegetative communities found on the mall site. Six of them, comprising 60% of the site, only exhibit low diversity. The remainder including upland forest, sucesional(sic) shrub, and wooded swamp wetland, exhibit relatively moderate diversity. 24 of the 76 acres to be altered by the project fall within these three vegetative categories. Suitable habitat for a typical variety of wildlife species is provided by these communities. A list of observed species is contained in Appendix B of our EIS.

b) During construction, some wildlife mortality and displacement will occur among less mobile groups of animals, such as small mammals, reptiles,

and amphibians. For other species, such as larger mammals and birds who may use the area only for feeding and cover, the displacement will be partial because their home ranges are more extensive. However, since other habitat areas that they use could be at maximum carrying capacity, some losses of these larger mammals or birds may occur. As portions of the site revegetate after construction, some wildlife species, such as small mammals and a variety of songbirds, should reinhabit the undeveloped and landscaped areas around the mall structures and parking areas.

c) Three uncommon species, the great blue heron, osprey, and common snipe, were observed one time each during field surveys. They appear to be transient in the project area, therefore, impacts on them are expected to be minimal.

d) F&WS has developed a list of endangered or threatened species in Connecticut (no plant species have been included). None of these species have been recorded on the site, nor is it likely any will be in the future, because there is no suitable habitat in the vicinity. Several Connecticut plant species are considered rare, however, none of these were found on the site.

d. Wetlands:

1) The project will eliminate 7.2 acres of wood swamp, 17 acres of shrub swamp, and 1 acre of marsh (see Figure 6). This represents all of the marsh and shrub swamp on the property and 29% of the wood swamp. Based on a 1972 inland wetlands map for the town, approximately 2,100 acres of wetlands are located in the town. Of this, approximately 900 acres or 43% occur along the Quinnipiac River.

2) The wood swamp, that occurs in the northern and southern portions of the site, is the most diverse in terms of plant species and diversity. They exhibit well-defined vertical stratification and good spatial diversity. The wood swamp provides good food chain production and good wildlife habitat. Shrub swamp occurs in the central portion of the site, primarily where gravel mining occurred.(sic) It has low plant diversity, but provides some foodchain production and limited wildlife habitat. The two areas of freshwater marsh to be lost total 1 acre. One area is natural, has good plant diversity, and because of its position next to wood swamp, provides good wildlife habitat. The other area was created by gravel mining operations. It is characterized by Phragmites and has low value as wildlife habitat.

3) As discussed in our EIS, the site's wetlands do not play a significant role in the area's overall drainage patterns because most of the upland drainage is diverted through the property via a channel constructed through the middle of the site when I-91 was constructed. The drainage does not pass through the majority of the wetland areas. Therefore, the site's wetlands do not effectively contribute to control of sedimentation or flushing action, store storm water, or purify water through filtration. In addition, the groundwater recharge potential of the site's wetlands is limited because of the relatively slow rate at which water passes through the soils in these areas and the presence of thick clay deposits beneath some of them. Also, areas of low topography in relation to surrounding topography tend

to be discharge areas for most of the year. As a result, it is unlikely that precipitation over the wetlands would have the entry location, pathway, or sufficient time to supply groundwater reserves before the river's influence would carry runoff downstream.

4) Mitigation:

a) On-site - On-site wetland mitigation was investigated, particularly in the northwestern segment of the site, beyond the fill area. This portion of the site is presently composed of wooded swamp, upland forest, successional shrub, and old field vegetative community types. As planned, this area will remain untouched as part of the project's buffer zone. As such, it maintains some of the site's best vegetative and wildlife diversity. To convert the area to wetland could reduce the diversity of the site.

For this reason, wetland creation in this section is not logical. Wetland creation to the southwest of the development area is precluded by existing wetlands and the propose detention pond.

b) Off-site

(1) Army policy on off-site mitigation for wetland impacts is that it will be sought on a case by case basis as may be necessary to comply with the 404(b)(1) guidelines or to otherwise satisfy public interest requirements. When there are significant losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment, and on-site mitigation is not sufficient to bring the project into compliance or satisfy the public interest, off-site mitigation may be accomplished where it is practicable and reasonably

enforceable. Off-site mitigation was considered, but we felt it was not warranted for this project when viewed against the character of the wetlands being filled, much of which are of low value and impacted by gravel mining operations.

(2) The applicant on his own, however, decided to investigate off-site wetland mitigation and has made a considerable effort to seek, through a variety of means, sites practicable for either acquisition or the procurement of conservation easements. The applicant's consultants conferred with us and F&WS, and other public officials and private parties. They reviewed documents, undertook numerous field visits and developed mitigation plans for potential sites. Several sites were considered (eight in North Haven, one in Hamden, and Community

Lake in Wallingford), the most feasible of which was located just north of the mall site at Wharton Brook.

a) The applicant's consultants met with representatives of the owner of this site to discuss the possibility of acquisition or conservation easements. The consultants undertook field investigations of the vegetation and wetlands on the site and proposed alternative configurations to facilitate mitigation. F&WS assisted the applicant's consultant in preparing a base line survey, using the same procedures as the HEP done for the mall site, to determine existing habitat values. During further discussions with the Wharton Brook site owners, the size of the parcel available for acquisition was reduced from 30 to 21 acres. An additional

mitigation plan was then developed. Subsequent discussions revealed other restrictions upon the proposed site. The owners wanted to retain the right to construct a railroad spur over a portion of the site and he insisted that there be no public access to the site. The spur would cross the area which contains the least diverse vegetation and which was to be the location for a proposed pond. The pond was to provide edge marsh and wetlands, the portion with the greatest HEP potential. Finally, this mitigation site became impracticable when the acquisition and development costs exceeded \$1 million.

b) A review of the other nine sites indicated limited opportunity to create or improve wetlands and/or open water areas, and the values of the parcels were such that improvement of wildlife conditions would not meet the

compensation suggested by the HEP process. In addition, most of the parcels were not contiguous to the Quinnipiac.

e. Water Quality:

1) Water quality in the Quinnipiac has been affected by a large population and heavy commercial and industrial activities located in the drainage basin. It is presently designated as Class C by CTDEP defined as having good aesthetic value and being suitable for fish and wildlife habitat, recreational boating, and certain industrial processes. The attainment goal is Class B, and the objectives are administered through the water quality certification program.

2) The project will cause slight increases in urban runoff contaminants, such as lead, cadmium, oils, grease and chlorides within the river.

As noted in our EIS, these increases would be negligible in comparison to existing base loads.

3) Of more concern is the potential degradation of water quality within the detention pond. The pond will stratify during summer months because of thermal and chemical differences between the epilimnion (surface layer) and hypolimnion. This could produce low oxygenated or anoxic bottom conditions. An aeration system may be required to alleviate these conditions should they occur. We and the applicant have developed a program to monitor this situation. This program would be a condition of our permit if the mall is to be built. In addition, monitoring of the pond's discharge would be required under the state's stormwater discharge permit and Water Quality Certification to insure

compliance with State water quality standards.

f. Aesthetics:

1) Views of the site from surrounding areas are restricted because the site is situated away from the majority of residential and commerical(sic) use areas. The views to be affected by the proposed mall are from residences to the west of the site on the hillside beyond the Wilbur Cross Parkway. The general viewing areas are illustrated on Figure 7. The residences to be affected are 110 to 260 feet higher than the site and 2,000 to 4,000 feet from it. Therefore, a view of the mall is possible from approximately 20 to 30 residences along Kings Highway and the Hartford Turnpike. Residences around Upper State Street are situated at lower elevations and do not have horizon vistas of the existing

FIGURE 7
TOWN OF NORTH HAVEN ZONING MAP
AREAS WITH VIEWS OF THE SITE

1" = 2,250'

North Haven Mall
Service Road
North Haven, Connecticut

Source: Appendix M, Community and Visual
Quality

site. From these locations, the site presently appears as a large, open and generally green area during spring and summer. The mall would change the site to one characterized by a large complex of white stone buildings and a blacktop parking area. The mall would also be seen from southbound lanes of I-91 and the Amtrak railroad lines. This impact would be of short duration (20 to 30 seconds) to passing cars and would not be obtrusive or inconsistent with other views. In addition, resident, primarily west of the site, may be affected by an increase in night sky brightness and glow from the parking lot lights. Their distance and higher elevation should help diminish these impacts. The applicant plans to attach light shields to the fixtures to minimize light spillage, and to reduce lighting by 75% after 11pm.

2) There will be a definite change in the site's visual characteristics, particularly as viewed from the residential areas to the west. Though efforts can be taken to landscape the mall area, it will be impossible to completely disguise its large-scale commercial character.

g. Cultural and Historic Values:

1) No impacts on historic structures are anticipated at the site as a result of mall construction or in any of the areas to be modified for traffic. CTDOT's proposed Bishop Street widening, which would accommodate mall-related traffic, may impact the proposed North Haven Bridge Historic District. As noted above, this roadway project is justified even without mall construction. CTDOT has reviewed potential impacts to this

historic area. Traffic increases generated by the mall should not cause significant increases in air or noise pollution along this historic street.

2) Archaeological(sic) investigations revealed three sites eligible for listing in the National Register of Historic Places. They could provide significant information about local and regional prehistoric lifestyles. Development of the mall could either damage artifacts or compact the soil enough to destroy stratigraphic data at all three sites. As detailed in our EIS, the location of these sites preclude feasible alternatives that would avoid adverse effects. Two of them would be located under proposed buildings and/or parking areas and the third would be under an access road. Therefore, we have made a finding that there will be adverse impacts to these archaeological(sic) resources.

3) We contacted the Department of the Interior regarding recovery and they indicated that there are no funds available in their program for such recovery. They indicated they seldom receive requests for such funding. Based upon our assessment of impacts to archaeological resources and concerns raised by the CTSHPO(sic) and ACHP the applicant volunteered to undertake a recovery program. At the applicant's request we will add a special condition to the permit to recover artifacts in accordance with a memorandum of agreement between the applicant, the Corps, the CTSHPD and the ACHP. This plan basically calls for recovery of a representative sample of material at each site with a resulting analysis and report. The mall would include a public information display of

archaeological work in Connecticut in general and specifically at the mall site.

h. Recreation:

1) According to the North Haven Commission of Parks and Recreation, the site has limited recreational value in its use by target shooters and motorcyclists. The commission feels that they have sufficient recreational areas to serve the needs of the town and that the mall site is not needed for outdoor recreational purposes.

2) Nearby recreational areas, including Wharton Brook State Park and the Montowese and Blakeslee Fields, could experience some reduction in air and noise quality from mall-related traffic increases. Views from the Quinnipiac State Park, directly across the river, would not be seriously altered by mall construction because the site is at the

same elevation as the park and it would be shielded by a wooded berm and vegetative buffer.

i. Economics:

1) Clearly, the most controversial issue surrounding this proposal is the potential economic impact to the region and particularly, to the City of New Haven. We have reviewed several reports on this issue submitted to us from sources including the applicant, New Haven and HUD. A full discussion of this matter is contained in our EIS and in sections below in this document.

2) Economic Benefits

a) Retail analysis demonstrates that the proposed mall would satisfy the currently unmet public need for retailing services in the market area principally defined by the New Haven-West Haven Standard Metropolitan Statistical

Area (SMSA). The market area includes the SMSA towns of North Haven, New Haven, East Haven, West Haven, Hamden, Wallingford, Branford, North Branford, Orange, Bethany, Woodbridge, Guilford, Madison and Clinton. It also includes the non-SMSA towns of Durham, Middlefield, Meriden, and Cheshire. The analysis indicates that the proposal would reverse the existing substantial leakage of shopping goods expenditures from the New Haven-West Haven SMSA (metropolitan area) to nonmetropolitan retail facilities. The proposed mall is projected to enhance sales inflows to the metropolitan area because of its size and its location near suburban communities.

b) Provision of the retail facilities associated with the mall should raise the level of merchant competition in the New Haven metroplitan (sic)

region, which in turn should improve retail services for shoppers and possibly promote lower prices. The proposed mall would also reduce the number of miles traveled for shopping purposes by approximately 12,000 miles per day, which would be translated into some minimal energy savings in the region.

c) The town of North Haven would receive significant fiscal benefits from the proposed mall. Local property tax revenues produced by the mall would likely exceed maximum town costs associated with mall related services by more than \$1 million annually. Assuming a continuation of current service levels in the town, this surplus is sufficient to have the effect of reducing the current property tax rate by 5 percent.

3) Economic Detriments

a) The proposed mall will cause a reduction in retail sales at other major retail areas. The maximum impact is projected to range from 9.2% to potentially up to 20% of existing shoppers goods sales volumes. With the loss of retail sales at existing stores would potentially come an associated amount of store closings and loss of jobs. Two evaluations have reported that these closings could range from 297,000 to 1,050,000 square feet of supportable existing retail space in the region. This would include a range of 75,000 to 370,000 square feet in New Haven (the majority of New Haven space by one estimate). A separate survey of store owners has projected that approximately 29 stores could be expected to close, constituting about 20 percent of the downtown stores.

b) Closing of retail space would also reduce the value of taxable property and the revenues collected. The mall could have the effect of decreasing revenues, except in North Haven where a positive tax benefit would result. This impact in the affected communities would range up to 0.4% of the tax rate (i.e., their revenues would decrease as if the tax rate had been lowered). In New Haven and Hamden, the loss would be approximately \$384,000 and \$179,000, respectively. The impact on other communities could reduce revenues from \$1,000 to \$24,000.

4) Employment

a) Construction of the proposed mall would require nearly 11,000 person-months of labor and would generate on the order of \$21.8 million in wages and salaries. These labor requirements

would vary over the projected 36-month construction period. They are expected to peak from 13 to 25 months after construction begins, as well as in the last 7 months of construction. It is estimated that 45 percent of construction-phase labor requirements would be filled by workers from the New Haven labor market area. Information from the Connecticut Department of Labor indicates that the construction worker pool in the New Haven labor market area is sufficient to fill these projected requirements. These positions would represent an infusion of about \$9.8 million in new wages into the New Haven metropolitan area.

b) Mall Properties, Inc., estimates that the operational phase of the proposed mall would require about 1,960 employees: 1,160 full-time, and 770 part-time positions. This represents

approximately 1,600 full-time-equivalent jobs. Of these, approximately 450 full time equivalent positions represent potential personnel transfers from existing regional retail facilities. As a result, new positions (net) associated with the operations of the mall were projected at 1,150 full-time equivalent in 1990.

c) The Phillips/Norwalk report, prepared for the City of New Haven, estimated that business loss in downtown New Haven as a result of the mall would eliminate approximately 160 retail jobs. Chung, however, who prepared another report for the City, estimated that the jobs that would be created by developing the mall would come at the expense of at least an equal number of jobs lost elsewhere in the region, and that there could even be a net decrease in jobs in the region. He believed that

New Haven could lose as many as 687 jobs, and Wallingford and Hamden could lose 237 and 433, respectively.

d) Mall Properties, Inc. estimates that between 1,120 and 1,300 of the 1,960 positions will be filled by residents of the New Haven metropolitan area, an increase of about 3 percent over existing employment in the wholesale and retail trade sectors and an increase in total regional employment of about 0.65 percent. Wages generated by these net new positions would be on the order of \$9.1 to \$9.5 million annually (in 1980 dollars) and would increase the total wages paid out in the New Haven Labor market area by about 0.4 percent.

e) The proposed mall would offer job opportunities for minority groups as well as eliminate some from

existing facilities. Information obtained from several anchor stores reflects that approximately 15 percent of sales jobs on a nationwide basis are held by minority group members. Comparable figures for the Northeast reflect higher percentages. Assuming a 15-percent figure, approximately 300 jobs of the 1,960 total could be filled by minority group members from the New Haven metropolitan area. However, some of the jobs that could be lost as a result of the mall's impact may affect minority workers from the downtown New Haven area.

f) A study was conducted for us by Savatsky to assess potential effects on minority employment in downtown New Haven. It was determined from the census that 7,800 to 8,000 persons were employed in the overall New Haven retail sector in 1977. Most worked in

neighborhoods and shopping plazas outside the Central Business District (CBD) where their positions depended on local sales. Approximately 1,200 were employed in sales in the CBD. Minorities make up about 38 percent of New Haven's population, but less than 10 percent of the sales force. Assuming that approximately 160 jobs would be lost in New Haven, according to the Phillips/Norwalk report and based on a 20 percent loss of business in the CBD, Savatsky estimated that 40 persons would probably have difficulty (sic) commuting to the North Haven Mall for potential reemployment. Most would be students and seasonal workers. Of those who could lose a job in New Haven, approximately 15 would be city resident, several of whom would be low income minority (black and Hispanic) workers. Therefore, minority workers

would not be disproportionately affected in the number of jobs lost by developing the proposed mall in the suburban North Haven area. These findings for the level of impact on minority workers are further affirmed by information contained in our EIS. The economic analysis and employment effects indicate that the New Haven CBD and the remainder of the city could lose a total of about 160 jobs assuming a 0-percent income growth and the development of the mall. The Connecticut Labor Department, Employment Security Division maintains records of the characteristics of job seekers registered with the Connecticut State Job Service. According to these records, in June 1982 more than 660 sales workers in the New Haven region were looking for jobs, 17 percent of whom were minorities. Therefore, assuming a worst-case situation where none of the

minority workers has alternative means of transportation to the proposed mall or other areas with retail opportunities, it can be assumed that minority workers would lose 27 (17 percent of 160) positions in New Haven's retail trades.

g) Based on the hiring patterns of the proposed mall's anchor stores, the proposed mall's work force would contain an estimated 300 minority employees. Allowing that some positions would be held by minority workers who transferred from other locations, and that the mall stores might hire proportionately fewer minority workers than the anchor stores would, the mall would represent a net gain of about 200 new jobs (including the above-cited potential loss of 27 jobs) in the New Haven-West Haven SMSA.

j. Air Quality:

1) Several air pollutants have been identified by EPA as being of nationwide concern and for which National Ambient Air Quality Standards (NAAQS) have been established. Of particular concern to this project are those related to motor vehicles including hydrocarbons, nitrogen oxides, photochemical oxidants, carbon monoxide and lead. The first three are reactive pollutants whose impacts are not site specific, but rather occur over a large area. Since the mall will not be adding new traffic to the region, no increase in these three pollutants is expected.

2) Mall traffic will result in increased carbon monoxide concentrations in North Haven particularly at and near the project site and feeder roads to the site. However, these concentrations will

be below NAAQS. Specific data and comparisons (sic) of carbon monoxide impacts with and without the mall are presented in our EIS.

3) We had not done a detailed analysis of lead levels for the DEIS because EPA had consistently predicted that ambient lead concentrations would decrease with the increasing use of unleaded gasoline, and that levels would be below NAAQS regardless of the development of the mall. Therefore, in response to several letters of concern, we did an analysis using an EPA developed methodology for the FEIS. This showed that lead pollutant burdens are projected to be 15% lower in 1984 than 1980. Also, while increased traffic volumes on feeder streets to the mall will result in increased lead concentrations on such streets, the analysis showed that on a

regional basis, pollutant burdens of lead with the mall would be essentially the same as burdens without the mall. This is expected because area-wide vehicle miles traveled with or without the mall would approximately be equal. In addition, EPA confirmed that they expect vehicular lead emissions to decrease in the future and that there is no reliable method for predicting increases in lead concentration at specific sites such as the mall.

4) Normal construction activities, such as land clearing, will result in increased dust emissions. However, this will be temporary, lasting only during the construction period, and will generally be limited to the construction site with minimal impact to residential areas or community facilities. To help

minimize these effects, dust control measures, such as watering affected areas and using covers on trucks are planned.

5) The operation of the mall will not cause any NAAQS violations and will be consistent with the control strategies of the State's Air Quality Implementation Plan. Also, as noted earlier, the CTDEP Air Compliance Unit issued a permit for this project in 1976.

k. Noise:

1) Noise impacts relate to the traffic generated by the mall. We have found that the peak traffic hours are generally in the mid-afternoon and that noise levels should only rise about 3 dBA throughout the North Haven area. This is a barely perceptible increase. However, at six sites which are the main access streets to the mall, maximum increases may range from 4 to 5 dBA. This is a

small but noticeable increase. With the exception of Bishop Street, the access roads are located in nonresidential areas where the increases would (sic) constitute a relatively insignificant impact.

2) Levels of noise impacts resulting from construction are not expected to be of major significance because of the site's location (away and buffered from residential areas and adjacent to major feeder roads), and the limited duration of construction activities.

1. Traffic:

1) The mall will cause an increase in local traffic and some residential roads will experience additional vehicle trips. On some access roads existing congestion will increase and at the two new intersections created for the mall, this congestion will occur during peak hours.

2) Our detailed analysis of the major and secondary routes that would carry mall-related traffic within North Haven indicated that all can accommodate mall traffic adequately. Roads in the larger geographic area will not be affected to the same degree as roads in closer proximity to the mall. Five of 17 roadways would experience a decrease in level of service because of mall-related traffic during peak hours. This information indicates that road operating conditions should remain at acceptable levels of service with no substantial change in traffic conditions. In contrast to levels A and B, which generally provide for unrestricted traffic flow, level C could be related to occasional balky suburban strip traffic, or urban design criteria. Level D is generally

associated with urban flow characteristics, and levels E and F provide unacceptable levels of service.

3) ~~Location~~ in the immediate area of the proposed mall will have the largest volume and concentration of mall-generated traffic and consequently the most pronounced impact. In close proximity to the mall, movements at intersections would have the greatest effect on reducing traffic operating levels. Our analysis of 15 intersections indicates that all intersections would operate at levels from A to D during the daily peak hour of traffic. Most would operate at level C, signifying generally stable flow with satisfactory operating speeds. With mall traffic, 4 of 15 intersections would operate at levels below that expected without the mall. For two local roads where intersections are proposed for mall

access, drivers would have to contend with intersections with D levels of service, instead of the free-flow conditions that presently exist. The proposed Washington Avenue-Mall Drive intersection would function at a service level D during its peak period, rather than having free-flowing traffic. At the Route 22-Valley Service Road intersection, mall-related traffic would shift the peak hour of operation and would cause a level D service during that hour. Without the mall the worst peak hour condition is a level B service.

4) Traffic related problems are generally a matter for local or state level resolution or management. In this case, local officials have not indicated any severe problems and the state will be considering the matter through their

traffic permit review and in their deliberations over the Bishop Street improvement project. We do not anticipate any significant adverse traffic related impacts resulting from this project. However residents along access and feeder roadways are expected to feel a negative impact.

m. Water Supply:

Our study has shown that there is more than adequate service capacity and pressure within the public water system for all residential, commercial and industrial users including the mall within North Haven. This finding has not been disputed during our review process.

n. Energy Needs:

1) Energy consumed by the mall would have an insignificant impact on energy consumption in the area. The quantity of oil and natural gas that

would be consumed is equivalent to that consumed by about 100 homes. The applicant has indicated that once they are in design stage they may consider additional energy conservation methods in the operation of the mall buildings.

2) Currently, residents in the market area consume substantial quantities of fuel for shopping trips to acquire the goods and services of the type that would be offered at the mall. With the mall, fuel consumption for shopping purposes would only decrease by approximately .1 to .2%, an insignificant impact.

o. Land Use and Coastal Zone Management Plans:

1) This project site is not located in the State of Connecticut's Coastal Zone.

2) The proposed mall site is situated in a commercial and industrial

corridor, so potential interference with other town land uses, i.e. residential neighborhoods, would be minimal. The town has published a plan of development (North Haven's Plan of Development 1966-2000) that indicated that this site should be developed for a large scale commercial or industrial facility. The town built an access road to encourage this development and subsequently, by town meeting, they zoned the site for shopping mall development.

3) Residents feel strongly that a mall would have either negative or positive effects on their town and lifestyle. This is a local issue and an area of prime controversy between community residents. Opponents want to maintain their town without a mall and its associated impacts, while those in favor see it as beneficial to their needs and that

its presence is acceptable in its proposed location. It appears that operation of the North Haven Mall will not negatively alter the basic character of the town, since it would be located within the town's commercial/industrial corridor on appropriately zoned land although changed perceptions in quality of life are expected by some individuals.

10. Other pertinent remarks:

a. Extent of public and private need:

1) Public Need

a) One purpose of the proposed mall is to serve a public need for a depth and variety of shoppers goods and merchandise not now available at a single location in the New Haven area. It would offer a wide range of shopping opportunities at a single location, convenient for comparison shopping, in an

indoor environment. It could also serve to promote an increased level of merchant competition which could sharpen and improve retail services to area shoppers. The purpose of establishing such a mall would be to mix four anchor department stores with the diversity of specialized stores to fill a current void identified in the metropolitan area retailing base.

b) A public need for such a regional shopping mall has been identified on a retailing basis. This is partly illustrated by the New Haven metropolitan area's past losses of approximately \$72 million in expenditures to nonmetropolitan retail facilities. This leakage of sales is predicted to increase without the provision of new, large retail facilities within the metropolitan area. A centrally located major retailing facility would reverse this

leakage and enhance sales flows into the metropolitan area from nearby, nonmetropolitan communities.

c) Several studies have demonstrated that the present retail capacity of the region is underserved and could support new retailing facilities. Consumer capacity has been shown to exist for at least 600,000 additional square feet of shoppers' goods retail sales space. The proposed mall would probably be well supported since it would be a large center attractive to many consumers, offering newly built stores and a diversity of shops in one location; under one roof. Substantial numbers of people have expressed, through the mail and at public meetings, their support and desire for the proposed facility. As well, a substantial number are opposed to the proposed mall and actively express their

sentiments. Currently, there is no major enclosed shopping mall in the region. The few larger malls are at the periphery of New Haven's trade area and none within 24 miles of New Haven's downtown central business district.

d) In addition to creating these retailing and consumer benefits, the proposal would also benefit other public needs. Tax revenues generated by the proposed mall would supply fiscal support for the town of North Haven and would provide jobs in the region. Development of the proposed mall would serve North Haven's need to satisfy its long-standing land use and economic development plans for maintaining adequate public services and affordable levels of property taxes.

2) Private Need - The applicant's purpose is to provide goods and

services to the public for a profit within the private business sector.

b. Appropriate Alternatives:

1) We investigated several other schemes for meeting the purposes of this proposal including off-site locations. Thirteen other sites, including downtown New Haven, were reviewed such as alternative single-site locations, expansion of existing retail centers, and the combination of two or more locations to provide comparable retail services. These alternatives were reviewed and assessed through a matrix of twelve factors including zoning, accessibility, utilities, land use compatibility, wetland constraints, etc. None were found to satisfy fully the purposes of the proposed project, which are stated on page 1 of this document. The analysis of these alternatives is presented in more detail

in our EIS. The most feasible of these alternatives, downtown New Haven, warranted further investigation.

2) New Haven

a) Examination of the City of New Haven as an alternative to the proposed mall focused on the downtown area. No other section of the city offers the opportunity for a sufficient concentration of retail activity to attract a significant number of shoppers' goods facilities. After reviewing department store location strategies, sales projections, site constraints and limitations, foreseeable actions and commitments, and funding needs confronted by the city, we indicated in our EIS that downtown New Haven could not serve as a single-site alternative to the proposed mall or as a component in a combination of alternatives. Contrary to this, the

City of New Haven strongly believes that they have a plan which will result in their downtown serving as an alternative to the North Haven Mall.

b) The city has shown that during our review process, particularly since early 1983, various proposals contained in their plan have moved from the planning stage to committments (sic) and construction. They feel that their development momentum will continue to build as projects are completed and new ones are proposed. Following are further details on some of the elements of the city's development plan. Also, refer to Figure 8. These elemenents (sic) also include non-retail projects (ie office and residencial(sic) developments) which New Haven feels clearly indicates the vitality of downtown's revitalization.

1. _____
2. Shubert Square
3. Government Center
4. 59 Elm Street
5. Center Court
6. Palladium
7. Channel 8
8. Whitney Grove Square
9. Art's Center
10. SNETCO
11. Century Building
12. 9th Square
13. Union Station
14. Air Rights Garage
15. Meadow Street Building
16. Medical Center
17. Science Park

FIGURE 8

DOWNTOWN NEW HAVEN

1" = 400'

Core: The major renovation of the Chapel Square Mall (CSM) and associated parking facilities, Phase I of the city's retail core development plan, is nearing completion. This project of The Rouse Company was financed jointly by a consortium of eleven local banks and institutions with some assistance from the city. Since the purchase of the CSM in 1983, Rouse has taken several steps which will upgrade the quality and productivity of the project. These improvements include an expansion of the retail and CSM area by approximately 30,000 square feet to accommodate new tenants and a major food court with 22 restaurants and food outlets overlooking the New Haven Green. New tenant commitments include a 17,000 square foot home furnishings store, Conran's, which will act as a mini-department store. Conran's and the food court

will anchor the north end of the CSM (the south end is currently anchored by Macy's) until a new department store is secured for the southwest corner of Temple and Chapel Streets. In addition to Conran's commitment, twelve mall stores will be renovated and upgraded. New Haven feels that these commitments (sic) are additional votes of confidence in the downtown's future (sic) as a retail center. The CSM renovations will bring the complex up to a total of 415,000 square feet of retail area. Of that, approximately 390,000 square feet is shoppers goods space. The city feels that these current renovations and remerchandising efforts will increase the sales productivity of the CSM significantly, increasing its impact on and share of the market far beyond the limited increase in retail area would indicate. Negotiations are continuing with

department store companies to secure a second major anchor for the CSM. A second department store would bring the total center to 600,000 square feet. The Rouse Company has expressed an interest in constructing additional small store space and bringing in a third department store as a third phasee (sic). This would increase the center size to 920,000 square feet.

(2) Shubert Square Entertainment District: The historic Shubert Theatre was restored to its former quality and reopened in December 1983. In September 1984 the restored 2000-seat Palace Theatre was opened which, along with the Shubert, will anchor the Shubert Square Entertainment District. Theme sidewalks and lighting for the District are now nearing completion. The city feels that the plan for

the district, being developed by the Schiavone Realty and Development Company, has expanded greatly in response to strong interest from retailers. It presently encompasses over 350,000 square feet of specialty retail and restaurant space to be managed as a coordinated retail center. An estimated 160,000 square feet will be net new retail space for the district. In addition to the theatres and retail space, the renovations include 128,000 square feet of office space, 55,000 square feet of residential space and numerous specialty uses.

(3) Government Center Area:

(a) Government Center - Chase Enterprises of Hartford, and Olympia and York of Toronto recently finalized their proposal to construct a 420,000 square foot office building on

the Government Center site next to the historic City Hall facade. They also propose to construct new City Hall offices on the site on a turnkey basis for the city. They would also have an option to construct an additional 250,000 square foot office building on a nearby site. The Chase proposal would bring the first major office building to the downtown suitable to attract major corporate tenancy. New Haven feels that this strong interest by developers of international stature will have a major beneficial impact on the downtown economy.

(b) 59 Elm Street - An example of private sector involvement in the downtown economy is the renovation of the former Bullard's furniture store on Orange Street. Private developers purchased the building

for \$1.5 million and are nearing completion on a \$4 million rehabilitation project. The transformation will provide 130,000 square feet of office space with no public subsidies other than a phasing in of the increased tax assessment.

(c) Center Court - Landmark Development Corporation of America will convert this 13-story building, which was owned by the Southern New England Telephone Company, into 74 residential units and 8,400 square feet of commercial space. To assist the developer, the City's Office of Downtown and Harbor Development applied for and received a UDAG of \$1.1 million which the City will loan to Landmark.

(d) The Palladium Building - the historic Palladium Building on Orange Street was restored

recently by a partnership, Palladium Associates Limited Partnership, to provide office and retail space, including quarters for Nicholas Furs, a long-time occupant of the structure. The renovated Palladium is adjacent to other restored buildings on Orange and Court Streets, developments carried out solely by the private sector.

(e) Channel 8 - New Haven indicated that after a number of years spent searching for a site, WTNH-TV (Channel 8) chose a city-owned parcel of land at the corner of State and Elm Streets for its new \$3 million headquarters and studio. The building, completed and occupied in 1983, also houses \$4 million in studio and broadcasting equipment.

Center:

(a) Whitney-

Grove Square - In conjunction with the H. Pearce Company, Realtors, the Carley Capital Group of Madison, Wisconsin proposes to develop 82,000 square feet of Yale-owned land at the corner of Whitney Avenue and Grove Street. Plans are for the construction of residential townhouses and apartments with 14,000 square feet of retail space, 88,000 square feet of office space and underground parking for about 125 cars. Also included is a 625-car parking garage on a nearby site. The garage is to be built privately and leased to the city. The total project cost is estimated at \$25 million. The Office of Downtown and Harbor Development applied for and received another UDAG for \$4.4 million to complete the financing of the project.

(b) Arts Council Development - The city's Arts Center, on Audubon Street between Orange Street and Whitney Avenue, is a neighborhood which blends arts and arts-related facilities with residential, office and commercial uses. Some of the uses included in the complex are (sic) the Neighborhood Music School, the Creative Arts Workshop and McQueeney Tower high-rise senior citizen housing. The remaining vacant land and some uncleared sites have been committed to the Arts Council, a non-profit organization of arts groups, for mixed-use development, including 70-80,000 square feet of offices, residences, and 10-14,000 square feet of specialty stores.

(c) SNETCO Business Staff Headquarters - The former New Haven Register building on Orange

Street has been renovated by the Southern New England Telephone Company at a cost of \$5.5 million. SNETCO consolidated its business-systems operations by moving five offices into the building on Orange Street. Included in the move were 160 employees from its Leeder Hill Center in Hamden. Others will be relocated from Bridgeport and Meriden and from three locations in downtown New Haven. Ultimately this newly-remodeled building will house from 300 to 400 employees.

(d) Century Building - Developers have proposed construction of a 220,000 square foot office building on the corner of Whitney Avenue and Grove Street diagonally across from the Whitney-Grove square project. In a preliminary planning stage, this project would also feature ground floor retail space and some structured parking.

(5) Ninth Square:

This area, bounded generally by Chapel, State, George and Church Streets, features a number of historic buildings available for renovations which take advantage of the incentives available to developers of historic properties under the Economic Recovery Tax Act of 1981. The property owners have formed an association to spur investment in the area and the Ninth Square Historic Limited Partnership has been formed to rehabilitate a number of structures. They have raised over \$4 million in equity to date which will be used to leverage conventional financing.

(6) Downtown South:

(a) Union Station - The \$24 million renovation of Union Station as a multimodal transportation center is nearing completion. The

project also features about 40,000 square feet of commercial office and retail space. This railroad station is already one of the most heavily used in the Northeast.

(b) Air Rights

Garage Commercial Space - The 2,400 space Air Rights Parking Garage, built over the Oak Street Connector adjacent to the Yale-New Haven Hospital, has space for 22,000 square feet of retail stores along York Street. The tenant improvements are under construction and the space has been leased to a variety of tenants.

(c) Meadow

Street Office Building - Developers are planning the rehabilitation of an older 130,000 square foot office building near Union Station. Plans include construction of structured parking for the tenants. This interest, the city feels, is

a direct outgrowth of the Union Station project and the planned rehabilitation of the Church Street South housing project nearby.

(d) Medical Center Area - A number of vacant city-owned parcels are left between the Yale-New Haven Medical Center and Union Station. A number of developers are interested in the area. The city and Medical Center are preparing a development plan to guide disposition of this prime land adjacent to the downtown.

(7) Science Park: In 1981, the city, Yale University, and the Olin Company formed a corporation to revitalize an 80 acre complex adjacent to the city and Yale. This site, which was formerly a chemical research and gun manufacturing complex will be developed for high technology companies. The goal is

to bring high tech jobs, training, and private investment back to a depressed section of the city. Currently, the park has over 40 tenants (sic).

c) The economic vitality of the city is important to the region's economy as a whole. However, the degree to which it's (sic) retail core may provide an alternative at the level of comparable shopping offered by the mall has not yet been demonstrated. A plan for New Haven's downtown and retail revitalization has been conceived and initiated; however, when it may be fully implemented to a point able to provide shopping to satisfy the objectives of the proposed North Haven Mall is not known. Therefore, downtown New Haven is not considered a practicable alternative at this time. We feel, however, that if the city is successful in its revitalization

plans, the downtown could provide a reasonable shopping alternative to the mall.

3) Orange Commons Mall

a) One of the other single-site alternative locations in Orange Connecticut (Marsh Road site) has been selected by another developer for mall development, known as the Orange Commons Mall. This mall would have three anchor stores, slightly smaller than those planned for the North Haven Mall. The site has had two major drawbacks, sewage and access. In early 1985 it was determined that the mall would be provided sewer service from the town of West Haven. In addition, the developer of the Orange Commons Mall has said he will pay for the rather extensive highway improvements necessary to access the site. This mall is now going through local and state regulatory processes, so it is considered

a viable project. The City of New Haven feels that this project now causes our analysis of alternatives in the EIS to be deficient.

b) The data contained in the EIS shows that the primary trade area of the North Haven Mall would have a slight overlap with that of the proposed Orange Commons Mall. This is shown by using sales flow data relating to the Connecticut Post shopping mall in Milford. This mall serves a similar market as would the Orange Mall. Our EIS shows that only 20% of the Connecticut Post's sales are from towns also in the North Haven Mall's market area. Two towns, West Haven and Orange, accounted for the bulk of that 20%. However, the sales from these two towns only comprise 5% of the total sales projected for the North Haven Mall. Therefore, even if the

Orange Mall did divert all of these sales, the impact to the North Haven Mall would be minimal. It still appears that this site is not a practicable alternative to meet the purposes of the North Haven Mall.

4) On-site

a) A three-anchor-store facility was considered to have the potential of serving a major segment of the retail needs of the region for which the four-store proposal was designed. Construction of a smaller mall would cause slight incremental reductions in the impacts to wetlands, requirements for flood plain fill, traffic impacts, and potential retail economic effects. The majority of effects would still be present. In one scheme, a three-store facility could decrease development costs by 20 to 23 percent for reduced parking requirements and building construction. This

would represent a one-time savings to the applicant. A second scheme, planned for a minimum development area by using decked parking to minimize wetland effects, would be at least as costly as the presently proposed mall and would optimally save approximately 2 to 4 acres of moderate wetland. A result of a smaller mall would be the continuous long-term reduction in revenues that a four-store facility would generate for the developer. A possible 25 percent (approximately \$23 million annually) decrease in revenues to the proposed mall businesses might occur as a result of reduced sales area and possible lower sales productivity. The economic/retail effects of a four-store mall would be reduced by \$5.9 million in transfer sales within the region and \$17.4 million in sales leaving the region or that could be attracted into the region.

b) Other configurations for the four-store project were considered including multiple level buildings, reduced parking, and decked parking. These alternatives were found impracticable because of cost, safety considerations, and poorly functioning site plans for accommodating vehicle and pedestrian flow. Also, these configurations were only found to provide minimal environmental benefits over the proposed site plan. The original proposal included a free-standing commercial building. Following our review as to its justification, this building and its associated parking was subsequently removed from the plan, thereby, eliminating the need to fill 1.3 acres of wetland including one acre of the more valuable wooded swamp.

4) (sic) No action -

a) This alternative would not satisfy the purpose and need for

which the proposal was made. As noted above, there are no other practicable locations for the applicant to develop a similar sized mall and there are no foreseeable retail proposals that could accommodate the retail needs of the area. New Haven's program has been initiated, but full implementation is uncertain. With no action it would be difficult for North Haven to realize its own development objectives.

b) It is unlikely that no action would lead to proposals for light industrial development since our investigations show that there is no great demand for such facilities in the area and there are other smaller and less expensive parcels available for such uses. Nor would it lead to outdoor recreation uses, since this is not consistent with the town's plans or desires.

c) The most probable no action alternative use would be that the southern portion of the site would retain its use for sand and gravel mining. The northern portion would probably remain in town ownership retaining its existing open space character providing a natural resource condition. This, therefore, would be the environmentally preferred alternative with respect to natural resources impacts.

c. Extent and permanence of beneficial and/or detrimental effects:

1) Beneficial impacts associated with this project relate primarily to economics such as outlined in the following summary:

a) Retail analysis indicates that it would satisfy the currently unmet public need for retail services in the market area and that it would reverse

the existing leakage of retail expenditures to nonmetropolitan shopping facilities. The mall would enhance sales inflows to the metropolitan area because of its size and location near suburban communities.

b) The mall would enhance the level of merchant competition in the North Haven - New Haven trade area, which should improve retail services and could tend to lower prices. Also, it would reduce the number of miles traveled for shopping purposes by almost 12,000 miles a day resulting in minimal energy savings and improvements to air quality in the region.

c) We have estimated that the mall would generate approximately \$21.1 million in construction wages and that its operation could create around 1,150 jobs. The effect of these new jobs

is contested since other retail establishments may be losing jobs to the mall. As a worst case, there may be no net increase in permanent jobs to the region.

d) North Haven would receive significant fiscal benefits from the mall. Local property tax revenues produced by the mall could exceed maximum town expenditures associated with related services by more than \$1 million annually. The current property tax rate could be reduced and the town would achieve a long-term goal of developing a portion of its commercial/industrial corridor.

2) Detrimental impacts are as follows:

a) The principal physical adverse impact would be the loss of 25.2 acres of wetlands and 6 acres of open water resulting in some displacement and

loss of wildlife. The loss of the open water area habitat will be partially mitigated by the creation of the 16.5 acre detention pond. As previously (sic) discussed, on-site mitigation for the wetland losses is not recommended and off-site mitigation is not warranted.

b) Artifacts and stratigraphic evidence at three archaeological sites could be destroyed from construction related impacts.

c) Another significant adverse impact would be the reduction in retail sales at other major retail areas. The maximum impact is projected to range from 9.2 percent to potentially up to 20 percent of existing shoppers goods sales volumes. The loss of retail sales at existing stores would cause an associated amount of store closings and loss of jobs. These closings could range

from 297,000 to 1,050,000 square feet of supportable existing retail space in the region, including a range of 75,000 to 370,000 square feet in New Haven. A survey of New Haven store owners has projected that approximately 29 stores could be expected to close, constituting about 20 percent of the downtown stores. Loss of business and jobs in downtown New Haven may directly affect 160 people. Other estimates of job losses in the region range from 600 to a worstcase (sic) figure equalling nearly all the jobs that could be created by the proposed mall. Closing of retail space would also reduce the value of taxable property and revenues collected in most areas except North Haven.

d) Local traffic would increase and some residential roads would experience additional vehicle movements.

On some access roads, existing congestion would increase, and at two new intersections, congestion would occur during peak hours.

e) The most significant detrimental impact is the potential adverse social and economic effects to the city of New Haven.

(1) Until about 1980, the city development strategies were still along the lines of the urban renewal policies of the 1950's and 60's. Buildings were still being demolished, parcels of land were being assembled, and large public projects were being planned. Practically no private developers were investing in the city. Apparently, confidence in New Haven's future was low in both the public and private sectors. While the city was becoming more depressed, the downtown retail core was deteriorating, theatres closed, industrial

plants closed and no new commercial development was occurring. Poverty worsened with a drift toward polarization of the metropolitan area along racial and income lines. The neighborhoods and property were deteriorating to a point where, during the peak of inflation in the late 70's the assessed value of property in the city was declining.

(2) In 1980, with a new city administration, new development policies and programs were planned to involve the private sector with the city to revitalize New Haven, particularly the downtown core. City officials felt that the key to solving their problems was to use the limited governmental tools they had such as marketing, tax incentives, public improvements, and the effective, targetted(sic) use of the limited federal funds available, to motivate private investment and reestablish confidence in New

Haven. Together with the privately sponsored Downtown Council, the city undertook a study with the American City Corporation to recommend an action plan for the downtown. Thirteen major development initiatives, requiring essential private sector involvement and participation, were proposed in the areas of the retail core, office expansion, the entertainment district, residential development, and the hotel and convention business. Progress is now being seen in each of these areas. A relationship with Yale University, based on a mutual interest in improving the New Haven economy, materially assisted this new development thrust. Yale recognized the threat of a declining downtown economy to their ability to attract high caliber students and faculty and has participated directly and indirectly in a series of key development

projects. Of significance is the decision by the Yale Corporation to invest at below market rates in four major projects in the retail core to help revitalize the area.

(3) The results of the newly motivated private sector and the resurgence of confidence are now becoming apparent. This confidence is shown by developers such as Rouse, Schiavone, and Fusco along with financial commitments (sic) from local banks, insurance companies, Yale, and societies such as the Knights of Columbus initiating major development projects. These projects are being orchestrated by the city toward their goal of urban revitalization.

(4) The public benefits of this recent development revitalization are great, however, the potential

detriments if it fails are of greater harm to the public. It is evident by visiting New Haven today, that an active, balanced retail core is one of the cornerstones of the city's deveopment (sic) program and of downtown New Haven's future as a regional center. The city feels that the public - private partnership upon which the development program is built is strong and based upon a confidence in continued success of their overall economic development effort. Though this partnership program may be strong, the confidence upon which it is based is fragile, such that construction of the mall would seriously undermine the major retail element of their revitalization program. The spin-offs would extend beyond the potential store closings, it would effect the basic confidence in the future quality, vitality, and diversity

of the downtown area affecting investments in housing, office and entertainment projects.

(5) A major element of the fragility of New Haven's recovery is the potential for segmentation of the regional retail marketplace along income lines. Regional suburban malls draw the vast middle of the retail market to its stores. This middle market is now a major component of the downtown retail base. The city feels there will be a disproportionate transfer effect in the middle market, leaving the downtown as an increasingly low-end shopping district serving a more local and transit-dependent, low-income population and thus also adversely affecting the desirability of downtown for the small, higher-end retail stores as well. The segmentation of the market by income, and, in part, along

racial lines, will adversely affect the overall growth potential of the downtown for private investment in the retail, office, and entertainment sectors.

(6) It appears that New Haven's social and economic well being is tied directly to a viable retail environment reflecting a balanced racial and economic mix. The construction of the mall would disrupt this balance.

d. Probable impact in relation to cumulative effects created by other activities:

1) A review of present and pending building permits associated with wetlands and floodplains along the Quinnipiac River in Wallingford, Hamden, New Haven, and North Haven indicated that approximately 110 acres of land is subject to potential development. If all were developed, similar impacts to those

associated with the mall would be expected. For example, along Valley Service Road there are approximately 60 acres of developable land available of which 24.6 acres are wetlands. Approval of the mall could also lead to pressure to fill these wetlands.

2) No cumulative traffic impacts are expected because there is no anticipated development that would add significant amounts of traffic to mall access routes. Our traffic studies incorporated a one percent growth rate factor which reasonably accounts for expected future growth. The cumulative projected traffic increases on Bishop Street, with the incremental increases generated by the mall would not have a significant impact on the small portion of the potential North Haven Bridge Historic District that fronts on Bishop Street.

3) As discussed in our EIS, we anticipate no adverse cumulative effects related to air quality, noise impacts, local utilities and services, and energy consumption.

4) Many concerns were raised during our process that the quality of life in New Haven and North Haven would be altered. Although the overall character of the communities may not be immediately altered, those persons directly impacted (i.e. by increased traffic on neighborhood streets or through loss of a job) will experience a perceived change in the quality of their life.

5) As discussed in our EIS, construction of the mall will induce ancillary retail growth and development near the site. This would reinforce the area as a commercial corridor and improve its competitive position.

6) As noted above, the Orange Commons Mall may introduce additional new retail space to the market area which could, when coupled with the North Haven Mall, cause even greater adverse impacts to New Haven.

11. Environmental Impact Statement:

Our FEIS with referenced materials, and (sic) the comments received in response to it, are hereby adopted, and it is my conclusion that the FEIS has adequately addressed all significant environmental issues and considered all reasonable alternatives.

12. A review of the project under the Section 404(b)(1) Guidelines was a part of our FEIS. That review is hereby adopted as our final evaluation, and I conclude that the project complies with the 404(b)(1) Guidelines.

13. Conclusions:

I have considered many factors in my public interest review of the applicant's proposal. Land use is one of those factors, and I recognize that the decision of state and local governments is conclusive as to that factor. In the matter under consideration, the views of the state and the local government about the proposed project are different. While the land may be used for a shopping mall under North Haven's zoning regulations, the Office of Policy and Management, Comprehensive Planning Division, of the State of Connecticut has taken the position that the development of a shopping mall at North Haven is inconsistent with the state's conservation and development policies. But even where state and local authorities give zoning or other land use approval, a person conducting a public

interest review must make a thorough objective evaluation of an application in full compliance with applicable laws and regulations (See 49 FR 39478 and 39479).

Therefore, in my public interest review I considered factors other than land use. Those factors, where applicable, are listed in 33 Code of Federal Regulations Section 320.4(a), namely, conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, flood hazards, flood plain values, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, flood(sic) and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people.

On the basis of my evaluation of the relevant public interest factors I signed

a Record of Decision on 24 November 1984, in accordance with procedures set out in the regulations. The Record of Decision contained a finding that the permit be denied. It was not the final action on the application, however, since I had not prepared and had not signed a letter notifying the applicant that the permit was denied. Final action, in the case of a denial, does not occur until the official concerned signs such a letter. (33 Code of Federal Regulations Section 325.2.) After the Record of Decision I offered the applicant an opportunity to meet with me to discuss my findings, and the applicant accepted the offer. Typically, where a final action to deny a permit is contemplated an applicant may withdraw the permit; he may choose to accept the denial; or he may seek to overcome the

reasons for denying the permit by amending his proposal. In my meeting with representatives of Mall Properties on 24 November 1984 they asked for a chance to submit modifications to the project and I agreed to give then(sic) the chance. They had hoped to submit their modified proposal within three or four weeks after the meeting, but did not deliver it to me until 25 June 1985.

The resubmission presented on-site wetland mitigation to compensate for the most important wetlands lost. Portions of parking areas would be raised, and additional flood storage was proposed to lessen previous flooding impacts. Socio-economic impacts to New Haven were proposed to be mitigated by the opening of three anchor stores in 1987, delaying until 1991 the opening of the fourth anchor store, contributing \$100,000 in

job training funds to the city of New Haven, and petitioning the transit authority to provide bus service for potential mall employees from New Haven. After reviewing this submission, I determined that although the changes would be of some limited benefit to New Haven, it was not sufficiently changed to warrant further public notice. The applicant's representatives then came forward with another submission which included additional on-site wetland mitigation. Further, in replacement of the \$100,000 job training fund, the applicant proposed to commission a study to determine the effects of the mall on employment and retail space in New Haven. In conjunction with this study, Mall Properties would place \$1 million in a trust fund for 10 years with the earnings to be used to alleviate any actual negative impacts

forecast by the study and realized after the mall's completion.

I find that, although there is still a net loss in wetland resources, the proposed on-site wetland creation, if successfully developed, would substantially compensate for lost values of the most important seven acres of wood swamp and freshwater marsh. Flooding impacts, although lessened further and not major, are nonetheless troublesome to me when viewed against the policies of the flood plain executive order and one of the Corps (sic) basic missions of providing flood protection.

Still weighing most heavily, however, is my concern for the socio-economic impacts this project would have on the City of New Haven. I had encouraged the applicant to meet with the Mayor of New Haven with the hope that they

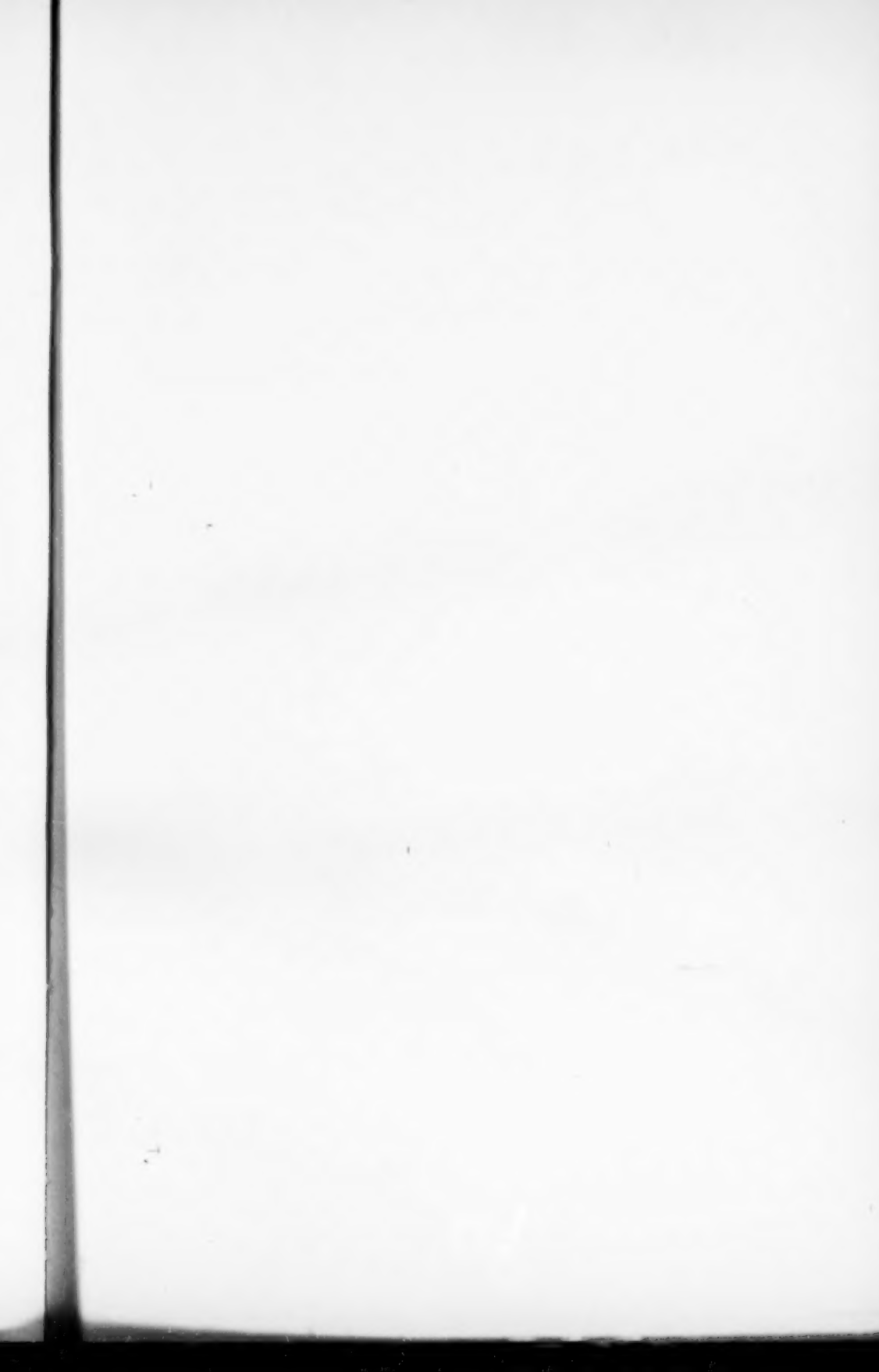
would find common ground. Even though they met, it was to no avail. While the applicant has made proposals to mitigate socio-economic impacts, including the most recent one described above, he has not, in my view, gone far enough.

The Hartford regional office US Department of Housing and Urban Development has expressed concerns about the mall from a national and Federal perspective. (Recently there has been an indication that these views might be tempered at its Washington level.) Local elected leaders have differing views on the Mall. The First Selectman of North Haven favors the Mall, the Mayor of New Haven is opposed to the Mall. At the State level, the Connecticut Office of Policy and Management, Comprehensive Planning Division has stated that the Mall is contrary to state urban policies. Also, during my July

1985 meeting with Connecticut's Governor O'Neill, he indicated that he felt it was not worth the risk to New Haven of building the North Haven mall. I have therefore concluded, that this project is contrary to the public interest and the permit is denied.

20 Aug. '85
DATE

//s//
DIVISION ENGINEER



IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF NEW HAVEN, CONNECTICUT,

Petitioner,

vs.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY,
et al.,

Respondents.

On Petition For a Writ of Certiorari to The United States
Court of Appeals For the First Circuit

**BRIEF FOR RESPONDENT
MALL PROPERTIES, INC.: IN OPPOSITION**

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QUESTIONS PRESENTED

The petition for certiorari presents the following two questions:

1. Whether the Court of Appeals correctly concluded that the District Court order vacating the denial of a permit by the U.S. Army Corps of Engineers and remanding the matter to the Corps of Engineers for further proceedings on the permit application is not a "final decision" subject to appeal under 28 U.S.C. §1291.

2. Whether the Court of Appeals correctly concluded that the appeal by the City of New Haven does not fall within the exception for appeals by federal defendants from remand orders imposing a new legal standard on the government agency because the City will be able to obtain review from the final determination of the Corps of Engineers.

PARTIES TO THE PROCEEDING

The petitioner is the City of New Haven, Connecticut. The federal respondents are John O. Marsh, Jr., as Secretary of the Army; Lt. General E.R. Heiberg, as Chief of the United States Army Corps of Engineers; Col. Thomas A. Rhen, as Division Engineer, New England Division, United States Army Corps of Engineers and the United States Army Corps of Engineers, Department of the Army. Mall Properties, Inc. is also a respondent.¹

¹ Mall Properties, Inc. has no parent, subsidiary, or affiliated corporations.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

NO. 88-18

CITY OF NEW HAVEN, CONNECTICUT,
Petitioner,
v.

JOHN O. MARSH, JR., SECRETARY OF
THE ARMY, ET AL.
Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the First Circuit

BRIEF FOR RESPONDENT
MALL PROPERTIES, INC. IN OPPOSITION

Respondent, Mall Properties, Inc.,
opposes the petition of the City of New
Haven for certiorari to the United States
Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 841 F.2d 440 (1st Cir. 1988) (App. B at 3a-23a).² The denial of the petition for rehearing and suggestion for rehearing en banc is unreported decision, No. 87-1827, (1st Cir. April 7, 1988) (App. A at 1a-3a). The memorandum and order of the District Court is reported at 672 F. Supp. 561 (D. Mass. 1987) (App. D at 25a-84a).

JURISDICTION

The order of the Court of Appeals (App. B) was entered on March 11, 1988. The petition for rehearing and suggestion for rehearing en banc (App. A) was denied on April 7, 1988. Petitioner apparently

² The decisions below and other materials are bound in an appendix submitted by petitioner City of New Haven. References to the appendix are designated parenthetically as "App." followed by the page(s) number on which the referenced material appears.

invokes jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND
REGULATORY PROVISIONS INVOLVED

28 U.S.C. §1291

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Other relevant statutes and regulations are set forth in the Addendum to the brief of petitioner City of New Haven.

STATEMENT OF THE CASE

Mall Properties has been attempting since the early 1970s to develop a

regional shopping mall in the metropolitan New Haven area in order to meet an undisputed long-standing need. The site selected is situated in an industrial/commercial corridor in the Town of North Haven, parallel to the Quinnipiac River. This site had been extensively ravished and disturbed by earlier strip mining and quarrying operations, which created approximately 18 acres of low grade scrub wetlands and small ponds. The development of the mall would require the filling of these areas, together with limited amounts of natural wetlands. Consequently, the Corps of Engineers determined that development of the mall would necessitate a permit pursuant to Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. §1344, and Section 10 of the Rivers and Harbor Appropriations Act of 1899, 33 U.S.C. §403.

The Corps of Engineers' administrative process commenced in early 1979, and included the preparation and circulation of draft and final environmental impact statements pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 et seq., and the holding of public hearings. Throughout the process, New Haven opposed the development of the mall, claiming that a North Haven mall would compete with New Haven's downtown shopping area by diverting customers and retail stores, thus adversely affecting the City's economy.

The Corps of Engineers issued its Record of Decision denying Mall Properties' permit application on August 20, 1985. (App. H 104a-272a). The document reflected the conclusions of the environmental impact statement that the proposed mall would not have significant

effects on the environment, including wetlands and flooding, and that the principal, if not sole, area of controversy surrounding the proposed development was its potential economic effect upon the City of New Haven. The Record of Decision concluded that the mall's potential for jeopardizing New Haven's efforts to stimulate development in its downtown area -- principally through an erosion of "confidence" in such efforts -- warranted permit denial. In reaching its determination, the Corps relied upon its perception, gleaned from a private meeting with the Governor of Connecticut, that the State opposed the development. (App. H at 258a-259a, 270a-272a).

Mall Properties commenced this litigation in October 1985, and moved for summary judgment in January 1986. The federal defendants cross-moved for

summary judgment, as did the City of New Haven (which had previously been allowed to intervene). The District Court ruled that (i) the Corps of Engineers' denial of permits for the proposed shopping mall, principally upon the effect of economic competition with City of New Haven, exceeded the agency's authority, and (ii) the Corps had violated its regulations and improperly relied upon the supposed opposition of the Governor of Connecticut to the proposal. On September 8, 1987, the District Court issued an order remanding the matter to the Corps of Engineers for further proceedings. (App. D at 25a-84a).

On September 14, 1987, the City of New Haven filed a notice of appeal. The Solicitor General determined not to appeal the Order, and on November 18, 1987 the federal defendants moved to dismiss the appeal of the City of New

Haven. On December 2, 1987, Mall Properties joined in the federal defendants' motion to dismiss. The Court of Appeals granted the motion and dismissed the appeal for lack of jurisdiction on March 11, 1988. (App. C at 24a).

The Court of Appeals held that the District Court's remand order was not a final appealable order susceptible to immediate review. The Court rejected New Haven's argument that the District Court had entirely disposed of the matter before it by remanding the proceeding. The Court held that the order was not a final judgment because it "does not grant Mall ultimately what Mall wants." (App. B at 8a). The Court found that what Mall Properties ultimately wants is "the proper permits themselves and, in the event of a judicial challenge to the permits, a judgment adjudicating Mall's

entitlement to the permits." (App. B at 7a). The Court concluded that the District Court order "is but one interim step in the process towards Mall's obtaining its ultimate goal." (App. B at 8a).

The Court of Appeals recognized that, although appeals have been allowed in some cases from orders remanding to an agency for further proceedings, those cases had all involved appeals by the government or a government agency from the imposition of a new or unsettled standard on the agency, which "had no avenue for obtaining judicial review of its own administrative decisions...." (App. B at 15a). The Court found the inability of an agency to appeal from its own determinations crucial, and held that this exception for immediate appeals by agencies from the imposition of a new legal standard was based on the fact

that "unless review were accorded immediately, the agency likely would not be able to obtain review." (App. B at 17a).

The Court concluded that the City of New Haven did not fall within this exception. Unlike the Corps of Engineers, the City will be able to seek judicial review if the permit is granted, and if the District Court upholds the grant, appeal to the Court of Appeals and argue that the original permit denial was proper. (App. B at 18a).

The City of New Haven filed a Petition for Re-hearing and Suggestion for Re-hearing en banc on March 24, 1988. The Court of Appeals denied the petition on April 7, 1988. (App. A 1a-2a).

THE PETITION SHOULD BE DENIED

The City of New Haven seeks a writ of certiorari to review a determination of the First Circuit Court of Appeals on

a procedural issue which is fully consistent with established law in the First Circuit and other circuits. Based on the policy that piecemeal appeals are to be avoided, it is a well-settled general rule that remand orders are not final decisions susceptible to immediate appellate review. Applying this rule, the Court below dismissed New Haven's appeal from the District Court's remand order for lack of jurisdiction.

The City has demonstrated no valid ground to disturb the Court of Appeal's well-reasoned determination. The remand order is not a final decision, but an intermediate step in this permit application proceeding. The Corps of Engineers has yet to make, in the remanded proceeding, a determination on Mall Properties' permit application, and there may be further appeals from the Corps of Engineers' decision.

Moreover, the District Court remanded the proceeding on two grounds: (i) the Corps' improper denial of the permit based on economic factors, and (ii) the failure of the Army Corps of Engineers to follow its own regulations in not giving Mall Properties an opportunity to rebut the supposed objections of the Governor of Connecticut. New Haven focuses solely on the economic issue and completely ignores the procedural issue. As remand to the Corps of Engineers was required in any event to correct this procedural error, dismissal of the appeal was appropriate for this reason alone to avoid piecemeal review.

New Haven argues that the District Court order is immediately appealable by the City under governing case law because the order imposes a new legal standard with respect to the economic issue on the

Corps of Engineers. New Haven is incorrect. As the Court below correctly concluded in its detailed analysis of the decisional law, the exception to the rule that remand orders are not immediately appealable applies only to appeals by federal defendants from remand orders which impose a new or unsettled legal standard on the government or government agency. The reason for this exception is that an agency has no avenue for review of its own decisions, and would have no later opportunity to appeal.

The City of New Haven does not fall within this exception to the general rule. Unlike a federal agency, the City will have a later opportunity to obtain review of the District Court order. If the permit is granted in the remanded proceeding, the City can raise the economic issue on appeal together with any other appealable issues arising from

the remanded proceeding. If the permit is denied on remand, and no appeal is taken, the disputed issue will become moot, and an unnecessary appeal will have been avoided. If an appeal is taken, the City can raise the economic issue at that time.

In any event, the District Court's ruling that the Army Corps of Engineers exceeded its authority in basing permit denial on economic factors is not a new legal standard requiring immediate review. The District Court merely followed this Court's decision in Metropolitan Edison Co. v. People Against Nuclear Energy ("Metropolitan Edison"), 460 U.S. 766 (1983) in holding that the Corps of Engineers may not base permit denial on economic effects unrelated to changes in the physical environment. In addition, the District Court's ruling requiring the Corps to adhere to its own

regulations, which the City consistently ignores, is hardly a novel one. If appellate review were so urgent, the federal defendants presumably would have appealed.

Moreover, the determination of the Court of Appeals that the administrative proceedings on the permit application should be completed, and all appealable issues saved for a single appeal, does not prejudice New Haven.

A. Standards For A Writ Of Certiorari

Pursuant to Rule 17.1 of this Court, a review on writ of certiorari "is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." New Haven argues its case with high blown rhetoric and purple prose in an apparent effort to capture and retain the Court's interest, but never addresses the standards it must meet for

review.

Supreme Court Rule 17.1 sets forth three categories of reasons that will be considered in reviewing a petition on writ of certiorari, two of which are pertinent here:

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; ... or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * *

(c) When ... a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

New Haven's hyperbole concerning an alleged conflict in the circuits and the urgent need for review notwithstanding, the decision of the Court below is not in conflict with the decisional law of any other court of appeals; nor does the decision of the Court of Appeals involve

an important or unsettled issue of federal law in need of resolution by this Court. The Court of Appeals merely decided the procedural issue of whether immediate review of New Haven's appeal from the remand order of the District Court was permissible. Based on the applicable law of the First Circuit and other courts of appeal, the Court determined that the remand order was not a final decision susceptible to judicial review. New Haven will have a later opportunity for judicial review if the permit it opposes is granted, or if the permit is denied, and that determination appealed.

B. The Court Of Appeals Correctly
Applied The Established General Rule
That Remand Orders Are Not Appealable

Pursuant to 28 U.S.C. §1291, the Court of Appeals has jurisdiction to review "all final decisions of the district courts...." As recognized by

the Court below (App. B at 8a), this Court has defined a final decision as "one which 'ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment.' Catlin v. United States, 324 U.S. 229, 233 (1945)."

In dismissing New Haven's appeal from the District Court's remand order, the Court of Appeals applied the well-established general rule in the First Circuit and other courts that an order remanding a case to an administrative agency or board for further proceedings is not a "final decision" from which appeals may be taken. E.g., In re Abdallah, 778 F.2d 75 (1st Cir. 1985), cert. denied sub nom. Drury v. Abdallah, 476 U.S. 1116 (1986); Memorial Hospital System v. Heckler, 769 F.2d 1043 (5th Cir. 1985); Farr v. Heckler, 729 F.2d 1426, 1427 (11th Cir. 1984); Howell v.

Schweiker, 699 F.2d 524, 526 (11th Cir. 1983); Eluska v. Andrus, 587 F.2d 996 (9th Cir. 1978); Giordano v. Roudebush, 565 F.2d 1015 (8th Cir. 1977); Barfield v. Weinberger, 485 F.2d 696, 698 (5th Cir. 1973); Paul v. Secretary of Air Force, 457 F.2d 294, 297-98 (1st Cir. 1972); Dalto v. Richardson, 434 F.2d 1018 (2d Cir. 1970), cert. denied, 401 U.S. 979 (1971); United Transportation Union v. Illinois Central R.R., 433 F.2d 566 (7th Cir. 1970), cert. denied, 402 U.S. 951 (1971).

The reason for this rule is that a district court order remanding a case for further proceedings "does not terminate the litigation." Farr v. Heckler, 729 F.2d at 1427. In this regard, the Court of Appeals in Bohms v. Gardner, 381 F.2d 283, 285 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968) observed:

Until the [federal defendant] acts on the remand we have no insight as to what his eventual decision will be. Thus in the words of Catlin v. United States the litigation had not reached its end on the merits and there is more for the court to do than execute the judgment....

The Court below succinctly stated the same principle with respect to the matter of Mall Properties' pending permit application:

The litigation has not ended. It simply has gone to another forum and may well return again.

(App. B at 8a). The Court thus correctly concluded that the order remanding this matter to the Corps of Engineers for further proceedings is not a final decision within the meaning of 28 U.S.C. §1291, and therefore may not be appealed by the City of New Haven.

New Haven argues that the Court of Appeals failed to give the requirements

of finality a "practical rather than technical construction" (quoting Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 170-71 (1974)) by treating the remand order as non-final. (Petition at 29, 31). This assertion is unfounded. The Court of Appeals explicitly focused on the practical question of whether the matter should be remanded for a determination on the permit application, which could moot the controversy over the economic issue, and save all appeals until after a final decision is made, or permit the City an immediate appeal, even though such appeal would be superfluous if the Corps later denied the permit on other grounds.

The Court of Appeals did exactly what this Court has directed should be done and what the City denies was done: it looked at the actual circumstances of the case, and balanced the particular

competing interests involved. It is the City which in actuality is arguing for a technical and not practical construction by asserting that because the District Court decided the economic issue, the remand order is a final decision, regardless of the facts and circumstances of the case which the Court of Appeals considered.

The fact of the matter is that New Haven is unhappy with the results of the Court's balancing process. However, the City provides no particularized reason why the Court of Appeal's balancing of interests should be disturbed. A "practical construction" of the finality rule by definition must depend on the facts and circumstances of each case. Despite New Haven's fancy rhetoric, the Court of Appeals' construction of the finality rule, based on the practical reality of the facts before it, does not

form a basis for judicial review.

C. Remand Was Required In Any Event
To Allow The Corps Of Engineers
To Comply With Its Own Regulations

In arguing that the District Court's ruling on the economic issue was a final decision, New Haven completely ignores the fact that the District Court remanded the proceeding on two grounds: not only the Corps of Engineers' improper reliance on economic factors unrelated to physical impacts, but also the Corps' failure to comply with its own regulation that Mall Properties have an opportunity to rebut the Governor of Connecticut's supposed objections to the proposed project.³ As

³ In view of its failure to acknowledge the second ground for permit denial, New Haven's contention that "all the parties agreed" that the economic issue was the single "legal linchpin" of the permit denial is particularly disingenuous. (Petition at 32). It is also untrue, as Mall Properties raised several other arguments for vacating the Corps' order which the District Court found unnecessary to address since it
(continued...)

New Haven acknowledges (Petition at 30 n.7) "procedural or evidentiary deficiencies" of this type typically trigger a remand for further proceedings to correct the administrative error.

In Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), for example, this Court held that a remand order from the court of appeals to the district court for further development of the facts is non-final, and not subject to appeal to the Supreme Court pursuant to 28 U.S.C. §1254(2). The remand order by the District Court to permit Mall Properties to respond to the Governor's perceived objection is also a remand for further development of the facts, and therefore non-final and non-appealable.

³(...continued)
remanded on other grounds. (App. D at 34a n.3).

Moreover, permitting New Haven to appeal the economic issue at this time, when the case must be remanded to allow Mall Properties to respond to the Governor in any event, would result in piecemeal review. That result is precisely what the Court of Appeals sought to avoid, and what New Haven seeks to achieve.

D. The Exception For Appeals By
Federal Defendants Does
Not Apply To New Haven

New Haven argues that the Court below has articulated a new rule of finality in conflict with the Tenth Circuit's rule in Bender v. Clark ("Bender") 744 F.2d 1424 (10th Cir. 1984). (Petition at 32). This argument is incorrect, and rests on a misapprehension of the limited holding of Bender, which is fully consistent with the Court of Appeals decision in this case. The court in Bender allowed the

federal defendant to appeal from a remand order imposing a different burden of proof to be applied by the government in the remanded proceeding because the standard of proof issue was a serious and unsettled one, but "most important", because the government "had no avenue for obtaining judicial review of its own administrative decisions and thus well might be foreclosed from appealing the district court's burden of proof ruling at a later stage of proceedings." (App. B at 15a). The crucial element of the decision in Bender and the other cases cited by the City in which federal defendants were allowed an immediate appeal is that "unless review were accorded immediately, the agency likely would not be able to obtain review."⁴

⁴ The federal defendants obviously recognized this rule when they declined to appeal from the District Court order
(continued...)

(App. B at 17a).

The Court below found that the City of New Haven does ~~not~~ fall within the exception articulated in Bender. As the Court noted, the federal defendants have not appealed from the District Court's rulings that (1) the Corps may not deny permits based on economic factors unrelated to physical changes to the environment and (2) the Corps violated its own regulations in not giving Mall Properties notice and an opportunity to rebut the governor's supposed opposition.⁵

New Haven's overblown rhetoric notwithstanding, the exception to non-

⁴(...continued)
and simultaneously moved to dismiss the appeal.

⁵ New Haven's musings (Petition at 50) as to why the federal defendants determined not to appeal is sheer speculation and merits no consideration whatsoever.

appealability of remand orders for appeals by federal defendants in certain circumstances does not interfere with the City's rights as an intervenor. The test applied by the Court below, consistent with Bender and other courts of appeals, is not any distinction between party or intervenor status, but the ability of the appellant to later obtain judicial review. A special rule has been carved out for government and government agency defendants because they have no means to appeal their own decisions.

As set forth in Point E, infra, the City is not precluded from participation in the remanded proceeding. Furthermore, if the permits are granted, the City may raise the economic issue on appeal together with any challenges to the remanded proceeding. The policy reasons for allowing an immediate appeal by federal defendants simply does not

apply to New Haven.

E. The Dismissal of New Haven's
Appeal to Avoid Piecemeal Review
Does Not Prejudice New Haven

New Haven claims that the dismissal of its appeal somehow constitutes a denial of justice through delay (Petition at 34), but fails to explain how it will be prejudiced by further administrative proceedings on remand, and a determination on the permit application, followed by judicial review of all appealable issues in a single proceeding. The City relies on Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950). In Dickinson, however, the Court merely noted that questions of appealability involve the competing considerations of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." 388 U.S. at 511.

There is no danger that New Haven will be denied justice by delay. The Court below expressly held that the City was not foreclosed from participating in the permit proceedings on remand, and "[p]resumably ... can urge environmental reasons why the permit should be denied." (App. B at 18a). If the permit is denied on other grounds, and the denial if appealed, is affirmed, New Haven would have achieved its goal, and could not rationally claim to have been harmed.

On the other hand, if after remand the permits are granted, the City can seek judicial review. If the District Court upholds the permits, the City can appeal to the Court of Appeals and argue that the initial permit denial based on New Haven's economic interests was proper and raise any other objections to the

remanded proceedings. (App. B at 18a).⁶ Thus, judicial review of the economic issue raised by the City is not denied; it is simply deferred so that all issues to be appealed, if not mooted by the Corps' determination, may be heard in a single proceeding.

New Haven's argument that dismissal of its appeal precludes it from bringing a subsequent challenge to the remanded proceedings in another jurisdiction is without merit. (Petition at 36). The City could have made a motion to change the venue of the original action if it truly believed that some other forum was

⁶ Although the District Court's ruling that the Corps of Engineers exceeded its authority could not be raised again in an appeal to the District Court from the Corps' decision after remand, it may be appealed by New Haven to the Court of Appeals. As New Haven is a party in this action, there is no reason why the Court of Appeals would refuse to hear its appeal after the proceeding is completed, and the Court below so found. (App. B at 19a).

more appropriate. It did not. New Haven's desire for forum-shopping does not outweigh the interests of judicial economy in avoiding piecemeal review.

The City's argument that neither Mall Properties nor the Corps of Engineers would be harmed if New Haven were permitted to appeal is incorrect. (Petition at 37). The piecemeal review requested by New Haven is contrary to the interests of both parties in the expeditious processing of Mall Properties' permit applications. The Corps of Engineers has no objection to the District Court's rulings, and in fact moved to dismiss the appeal. Most significantly, it is the Court of Appeals which would be harmed if New Haven's appeal were allowed to proceed, contrary to the policy against piecemeal review. As the Court itself held:

Were this court now to order

briefing on the socio-economic issue, decide that issue and affirm the district court, the case would be remanded and the Corps once again would decide whether to issue the permit. Likely another appeal would follow, necessitating another round of briefs, another familiarization with the record, and another opinion. Our decision on the socio-economic issue might turn out to have been superfluous were the Corps on remand to deny the permits on independent proper grounds. More efficient and quicker, in the long run, would have been to delay review and consider all issues at one time.

(App. B at 20a).

The City never articulates how it has been harmed by the Court of Appeals' determination. Although New Haven complains about the legal costs of proceeding with the remanded proceeding, the interests of its taxpayers would be served if the permit review process continues in the most expeditious manner, with appeal of the economic issues saved until after a determination on the permit

application is made, and if appealed, reviewed by the District Court. If the permit is denied in the remanded proceeding and there is no appeal, New Haven taxpayers will have been saved unnecessary litigation costs. Considerations of judicial efficiency and the financial interests of the parties thus counsel against disturbing the dismissal of the appeal.

The Court of Appeals was cognizant of the City's concerns. The Court recognized that if review were granted, and the Court concluded that the District Court erred on both the economic issue and the procedural issue concerning the agency's failure to afford Mall Properties an opportunity to rebut the Governor's opposition, "an unnecessary administrative proceeding could be averted." (App. B at 21a). However, the Court concluded that permitting review of

interlocutory rulings would "undermine the final judgment rule and open the door to piecemeal litigation and its concomitant delay, costs and burdens." (App. B at 22a). There is no reason to disturb the Court's careful balancing of policy concerns.

F. The District Court Did Not Impose
A Radical New Standard Justifying
Immediate Review

New Haven argues that the District Court established a wholly new standard for Corps of Engineers permitting decisions which is inconsistent with existing law and which is in need of urgent remediation. The urgency claimed is non-existent; certainly no factual basis is provided to support the City's hyperbole. The absence of any urgency is confirmed by the decision of the federal defendants not to appeal. Moreover, the City's legal arguments are without merit.

New Haven argues that the District

Court misapplies Metropolitan Edison, fails to give adequate deference to alleged past practice by the Corps in considering economic impacts, and is inconsistent with the Corps' public review regulations and with the Council on Environmental Quality ("CEQ") regulations. New Haven is wrong on all counts.

As a preliminary matter, the courts are not bound by an agency's interpretation of the scope of its statutory authority where such interpretation is contrary to Congressional intent. See Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 97 (1983); North America Industries, Inc. v. Feldman, 722 F.2d 893, 898-99 (1st Cir. 1983).

1. Section 10 of the RHA

In any event, New Haven's assertion

that economic impacts unrelated to physical impacts have been considered by the Corps since 1933 is without basis. (Petition at 41). United States ex rel. Greathouse v. Dern ("Dern"), 289 U.S. 352 (1933), relied on by the City, does not support its position.⁷ The petitioners in that case sought a writ of mandamus to compel the Secretary of War to authorize the construction of a wharf in the Potomac River pursuant to Section 10 of the RHA. The federal government had enacted legislation authorizing the establishment of a highway, which would require the purchase or condemnation by the federal government of a part of

⁷ New Haven argues that the Corps acknowledged a previously accepted practice to consider economic factors in the District Court. (Petition at 43). The memorandum of the federal defendants cited by the City, however, addresses no such practice. It only discusses the Dern case, which does not hold that the Corps may make permitting decisions based on economic competition.

petitioners' property and destruction of the wharf if constructed. At issue in Dern was whether, under the circumstances of the case, the extraordinary remedy of mandamus was appropriate. Holding that it had discretion to "refuse mandamus to compel the doing of an idle act" the Court denied the petition because the relief sought would be burdensome to the federal government and without any real benefit to the petitioners. 289 U.S. at 360. Dern thus involved exceptional circumstances where construction of the wharf would have been futile in any event, and a strong federal government interest and major project was involved. Dern does not authorize the Corps to balance the competing economic interests of two communities in promoting development in its permitting process.

Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910

(1971), contrary to the City's contention, does not give the Corps limitless discretion to deny a permit. In the first place, economics were not at issue in Zabel. Rather, the Corps had denied a permit because of the project's undue impacts to the physical environment. The court found that the Corps' consideration of environmental factors was authorized, and indeed required, by two other statutes -- NEPA and the Fish and Wildlife Coordination Act. Thus, the Corps there "t[ook] heed of", "effectuate[d]", and did "not thwart other valid statutory governmental policies." 430 F.2d at 209 (emphasis supplied). Zabel did not hold that the Corps could deny a permit for any political or economic reason it desired.

In Zabel, the Corps followed specific statutory directives in denying the permit. In Dern, too, the Corps'

determination was based on statutory directives respecting the federal highway project. In direct contrast, the District Court found that the Corps' permit denial was not based on any statutory directive, but was essentially an exercise of unbridled discretion without any Congressional authorization. Moreover, the lack of statutory authority for the Corps' conduct was compounded by the absence of any relationship between the economic interests on which the Corps based its decision, and any physical change to the environment.

2. The Public Interest Regulations

There is also no inconsistency between the District Court's decision and the Corps of Engineers' public review regulations. As the regulatory history of the public review regulations shows, the regulations do not authorize the

Corps, under the guise of environmental permitting decisions, to determine which of two communities should be allowed to stimulate economic development.

Until 1968, the Corps administered Section 10 of the RHA essentially to protect federal navigational interests.⁸ In December 1968, the agency provided in its regulations for additional factors to be considered in Section 10 permit decisions. These factors, added "in response to a growing national concern for environmental values and related federal legislation . . .", included: "fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest." Deltona Corp. v. United States, 657 F.2d 1184, 1187 (Ct. Cl. 1981), cert. denied, 455 U.S.

⁸ See generally "Regulatory Programs of the Corps of Engineers", 42 Fed. Reg. 37122-23 (July 19, 1977) ("Regulatory Programs").

1017 (1982).

Congress recognized the public interest standard and its limited scope. The March 17, 1970 Report of the House Committee on Government Operations explained that:

The Corps of Engineers, which is charged by Congress with the duty to protect the nation's navigable waters, should, when considering whether to approve applications for landfills, dredging and other work in navigable waters, increase its consideration of the effects which the proposed work will have, not only on navigation, but also on conservation of natural resources, fish and wildlife, air and water quality, esthetics, scenic view, historic sites, ecology, and other public interest aspects of the waterway.

H. Rep. No. 917, 91st Cong., 2d Sess. at 5 (1970) (emphasis supplied).

Section 404 of the CWA was enacted as part of the Federal Water Pollution Control Act of 1972 ("FWPCA"). In 1974, in order to implement Section 404 as well

as the requirements of other recent federal legislation, the Corps incorporated into its permitting regulations additional factors to be weighed, including "economics, historic values, flood damage prevention, land use classification, recreation, water supply, and water quality." Regulatory Programs at 37123 (emphasis supplied). See Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982).⁹

Although the regulations do not define the term "economics," the Corps' discussion preceding its 1977 regulatory amendments makes it clear that this new factor, like the others, was added in response to new federal legislation. Regulatory Programs at 37122. See also

⁹ The "economics" factor actually appeared for the first time in the interim regulations of May 10, 1973. 38 Fed. Reg. 12217 (May 10, 1973).

Deltona Corp. v. United States, 657 F.2d at 1187. The new legislation included FWPCA, the Marine Protection, Research and Sanctuaries Act of 1972 ("MPRSA"), the Coastal Zone Management Act of 1972, as amended ("CZMA"), and NEPA. 42 Fed. Reg. 37123 (July 19, 1977). Thus, the scope of the term "economics" must be ascertained by reference to such legislation.

None of this new legislation, however, anticipated or authorized the consideration of generalized economic factors. The FWPCA established Section 404, which provides only for an assessment of the economic impact of filling on the resources of a particular disposal site.

Pursuant to Section 404, Corps' permitting decisions are governed by guidelines developed by the Environmental Protection Agency ("EPA"). 33 U.S.C.

§1344 (b). These guidelines are to be based upon criteria comparable to those developed for ocean discharge permits pursuant to Section 403(c) of the Clean Water Act, 33 U.S.C. §1343(c)(1). The economic considerations within the ocean discharge criteria are limited to the economic values associated with the site to be filled (i.e. the "disposal site"). It follows that the economic criteria permissible under Section 404 are also those related to the disposal site.

Section 403 articulates certain general criteria which must be reflected in the ocean discharge guidelines. Among them are two which refer to economics:

(C) The effect of disposal of pollutants on esthetics, recreation and economic values;

* * *

(G) the effects on alternate uses of oceans, such as mineral exploitation and scientific study.

33 U.S.C. §1343(c)(1). The EPA guidelines developed to implement the

ocean discharge criteria identify the following "economic" considerations:

Potential for affecting the recreational and commercial values of living marine resources

40 C.F.R. §227.17(a)(2). The factors to be assessed in ascertaining the economic effects include the

(a) Nature and extent of present and potential . . . commercial use of areas which might be affected by the proposed dumping;

* * *

(h) Presence in the material of any constituents which might significantly effect living marine resources of recreational or commercial value.

40 C.F.R. §227.18. See also 40 C.F.R. §227.19. In short, Section 404 instructs the Corps to base permitting decisions on certain criteria, and the economic aspects of those criteria are limited to effects on commercial values and uses of the disposal site. The Act does not authorize the Corps'

consideration of broader economic factors in the permitting process. This limited scope of economics was confirmed in Buttrey v. United States, 690 F.2d 1170, 1180 (5th Cir. 1982), cert. denied, 461 U.S. 927 (1983).

The MPRSA provides for the Corps to issue permits for the transportation of dredged material for the purpose of disposing it in ocean waters. The governing provision, Section 103 (33 U.S.C. §1413), allows for a permit where, inter alia, the dumping will not unreasonably impact the economic potentialities of the disposal site. As in the ocean discharge criteria, there is no generalized economic standard. The legislation is, of course, inapplicable to Mall Properties' application.

Likewise, the CZMA (16 U.S.C. §1451, et seq.) is inapplicable to the North Haven Mall site. Finally, NEPA is

a procedural statute which does not expand the Corps' substantive decisionmaking to incorporate general economic effects of enhanced competition. See Strykers Bay Neighborhood Council Inc. v. Karlen, 444 U.S. 223, 227 (1980); Cape May Greene, Inc. v. Warren, 698 F.2d 179, 188 (3d Cir. 1983).

Consequently, the legislation which precipitated the inclusion of the "economics" factor in the "public interest review" neither anticipates nor authorized the consideration of broad socio-economic concerns. Rather, the economic concerns of the legislation applicable to the Corps' decisionmaking have consistently and uncategorically been limited to those directly related to the filling of the disposal site and not to indirect secondary effects of the ultimate development activity.

3. NEPA

Nor is there any inconsistency between the CEQ regulations and the District Court decision. The regulations merely define "effects" to include direct and indirect effects of a proposed action. 40 C.F.R. §1508.8. The regulations do not require or even suggest, as claimed by the City, that effects not proximately causally related to a proposed action are to be considered under NEPA. Nor could the CEQ regulations be construed in such a manner in light of the Supreme Court's decision in Metropolitan Edison. Since the Metropolitan Edison decision occurred subsequent to the promulgation of the relevant CEQ regulations, Metropolitan Edison and the regulations must be read in para materia; the District Court's adherence to this Court's decision can hardly be considered a marked departure

from governing law.¹⁰

New Haven claims that Metropolitan Edison involved only the threshold question of whether an environmental impact statement ("EIS") should be prepared and that the District Court applied Metropolitan Edison to the impacts to be considered in an EIS "for the first time." (Petition at 15). New Haven also argues that subsequent courts have limited Metropolitan Edison "to the threshold question of whether NEPA applies in the absence of recognized impacts." (Petition at 45). The City's interpretation of Metropolitan Edison and its progeny, and its attempts to distinguish these cases, is incorrect.

¹⁰ To the extent that the Corps' public interest review regulations are based upon NEPA, Metropolitan Edison had the same effect; thus the District Court's decision, as with the CEQ regulations, hardly constitutes a radical departure from existing standards.

It is clear from the Metropolitan Edison opinion that this Court did not intend to limit its holding to the threshold question of whether an EIS is required. At issue in that case was the interpretation of Section 102 of NEPA, 42 U.S.C. §4332(C), which directs all federal agencies to evaluate the "environmental impact" and any unavoidable adverse "environmental effects" of agency action significantly affecting the quality of the human environment. This Court held that the terms "environmental impact" and "environmental effects" include "a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue." 460 U.S. at 774. There is nothing in the opinion to suggest that the Court's general interpretation of this statutory provision was not intended

to apply to all NEPA issues, including the types of impacts that may be considered in an EIS.

A critical factor, which the City has overlooked, is that the term "environmental impact" as used in § 102 of NEPA, has the same meaning whether applied to the threshold question of the need for an EIS or the contents of an EIS. The City wants to draw an artificial distinction and assign a different meaning to the same words depending on the stage of the NEPA process solely to bolster its position. It is inconceivable, however, that Congress could have intended such an irrational construction of the statute.

Moreover, the City's reliance on Animal Lovers Volunteer Association, Inc. v. Weinberger ("Animal Lovers"), 765 F.2d 937 (9th Cir. 1985) and Pacific Northwest Bell Telephone Co. v. Dole ("Pacific

Northwest"), 633 F. Supp. 725 (W.D. Wash. 1986) for the proposition that Metropolitan Edison has been limited to the threshold question of whether NEPA applies is misplaced. (Petition at 45). In both cases the plaintiffs challenged the adequacy of the EIS. Animal Lovers, 765 F.2d at 938; Pacific Northwest, 633 F. Supp. at 726. Moreover, in Olmstead Citizens For a Better Community v. United States, 606 F. Supp. 964 (D. Minn. 1985), aff'd, 793 F.2d 201 (8th Cir. 1986), the district court applied Metropolitan Edison not only to the threshold question of the need for an EIS, but also to its alternative holding that the document prepared by the agency met the standards for an EIS, and was adequate. 606 F.Supp. at 974.

These authorities demonstrate that the courts have applied the "causally related standard" of Metropolitan Edison

to both aspects of the NEPA process-- the threshold question of the need for an EIS and the scope of an EIS. The District Court's application of Metropolitan Edison falls squarely within this framework, and is fully consistent with Metropolitan Edison and its progeny.

The District Court's reliance on Metropolitan Edison is also fully consistent with the Second and Ninth Circuit cases cited by the City.¹¹ Rochester v. United States Postal Service, 541 F.2d 967, 973 (2d Cir. 1976); Davis v. Coleman, 521 F.2d 661, 676-77 (9th Cir. 1975); Bersani v. EPA,

¹¹ Contrary to New Haven's assertions, Mall Properties did take issue with the EIS prepared by the Corps, by giving comments and critiquing, among others, the economic issues discussed in the EIS. In addition, Mall Properties argued in the District Court that the economic effects found by the Corps were overstated. Thus, Mall Properties did challenge the Corps' analysis of the economic issue.

Nos. 87-6275, 87-6295, (2d Cir. June 8, 1988). Rochester v. United States Postal Service involved a decision committed to agency discretion; e.g., whether to close or move a federal facility. There was no third party permit applicant. In that circumstance, unlike the instant matter, the federal agency is not regulating the private use of property, and the agency can consider economic factors. The Corps of Engineers in environmental permitting matters is, however, not vested with such unfettered discretion.

Davis v. Coleman involved the proposed construction of a major highway interchange in an agricultural area. The Court's holding that the agency was required to consider the environmental effects of the development which would result from the construction of the interchange is consistent with the

Metropolitan Edison standard. The impacts of urban development are physical changes to the environment which are at the heart of NEPA and which this Court found appropriate for consideration in an EIS, unlike the attenuated economic interests considered by the Corps. In addition, there was a direct causal link between the construction of the interchange and the changes to the physical environment which induced growth would bring. The opinion does not authorize the Corps to consider purely economic factors in its permitting decision. Moreover, both Rochester and Davis were decided prior to Metropolitan Edison. To the extent they differ from holding of Metropolitan Edison, the cases are not controlling.

Bersani v. EPA, which arose under Section 404 of the CWA, and not NEPA, involved the issue of alternative sites for a proposed shopping mall and the

relevant time period for determining whether an alternative site is available. The question of whether more than one mall could survive in the market area for purposes of alternative site analysis (slip op. at 3703) has nothing whatsoever to do with the scope of the Metropolitan Edison standard or the question of whether the Corps has statutory authority to deny a permit based on economic factors. Bersani related to the practicality of alternatives, not impacts.

The City's claim that the District Court's decision and supposed misplaced reliance on Metropolitan Edison has "imposed a new legal standard" (Petition at 43) is sheer hyperbole. The District Court announced no such standard. The District Court merely held that in this particular case, the potential social and economic effects considered dispositive

by the Corps lacked the requisite proximate causal relationship to the proposed shopping mall, and that the Corps had thus considered unlawful factors in its determination.

The City's assertion that the District Court substituted its own judgment concerning the factors to be considered by the Corps, and took upon itself the role of political decision maker, ignores the Court's well reasoned determination and is entitled to no consideration. Similarly, the assertion that dismissal of the appeal placed "the fate of thousands of acres of wetlands within New England" at stake without appellate review is nonsense. (Petition at 47.) There is nothing in the District Court's decision to preclude consideration of direct physical effects on the wetlands in the remanded proceeding. To the contrary, the

District Court noted that protection of the physical environment and natural resources should be the focal point of the Corps decision in the remanded proceeding. (App. D at 76a.)

We would respectfully suggest, in any event, that the City's concerns, to the extent that they have any validity, are more properly addressed in the first instance by the Corps of Engineers and not by the Court of Appeals. The Corps is in a better position than the Court to determine the weight it should accord to various factors in light of the District Court's opinion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be denied.

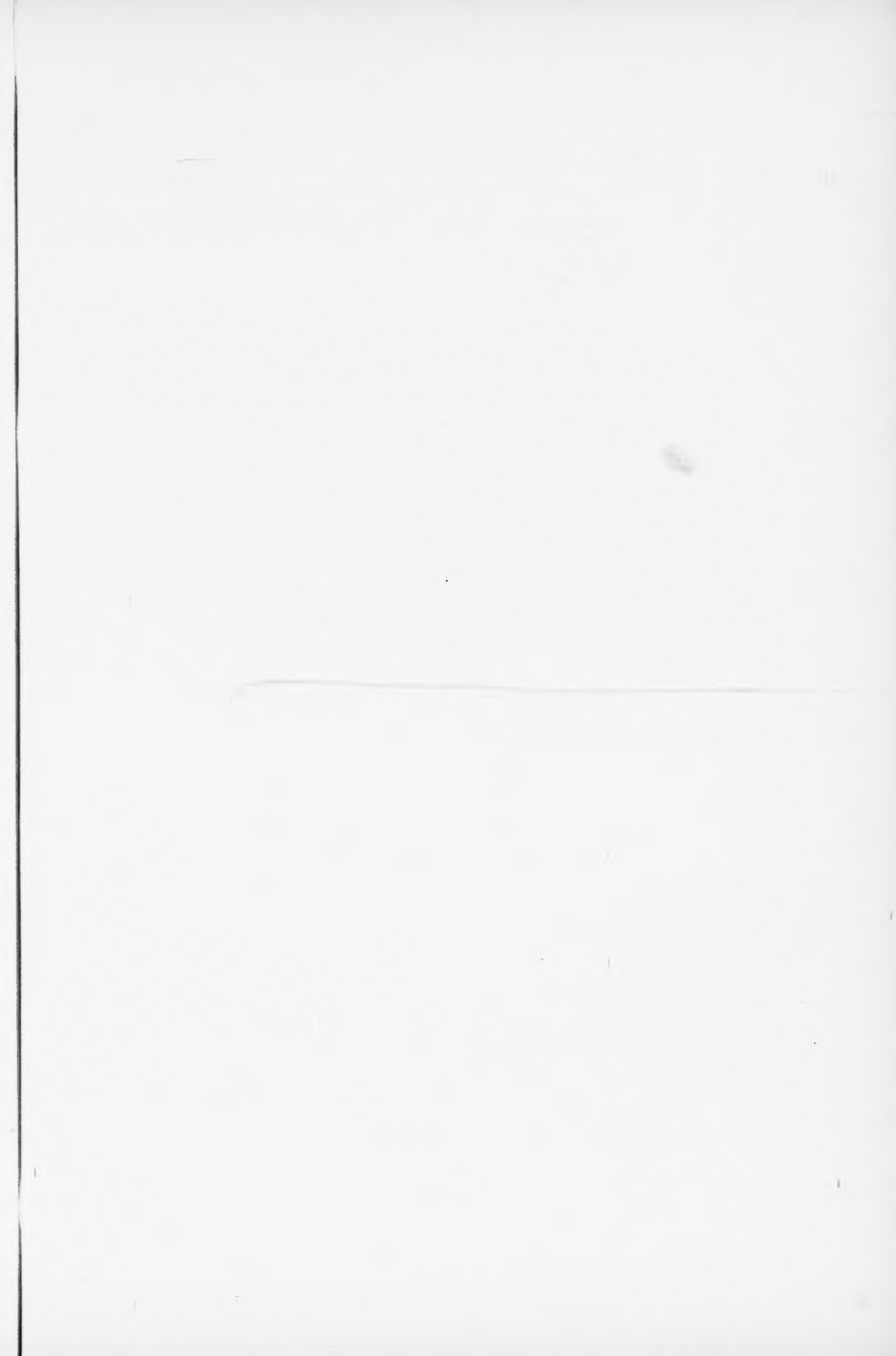
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(4)

Supreme Court, U.S.
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No. 88-18

JOSEPH E. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF NEW HAVEN, CONNECTICUT, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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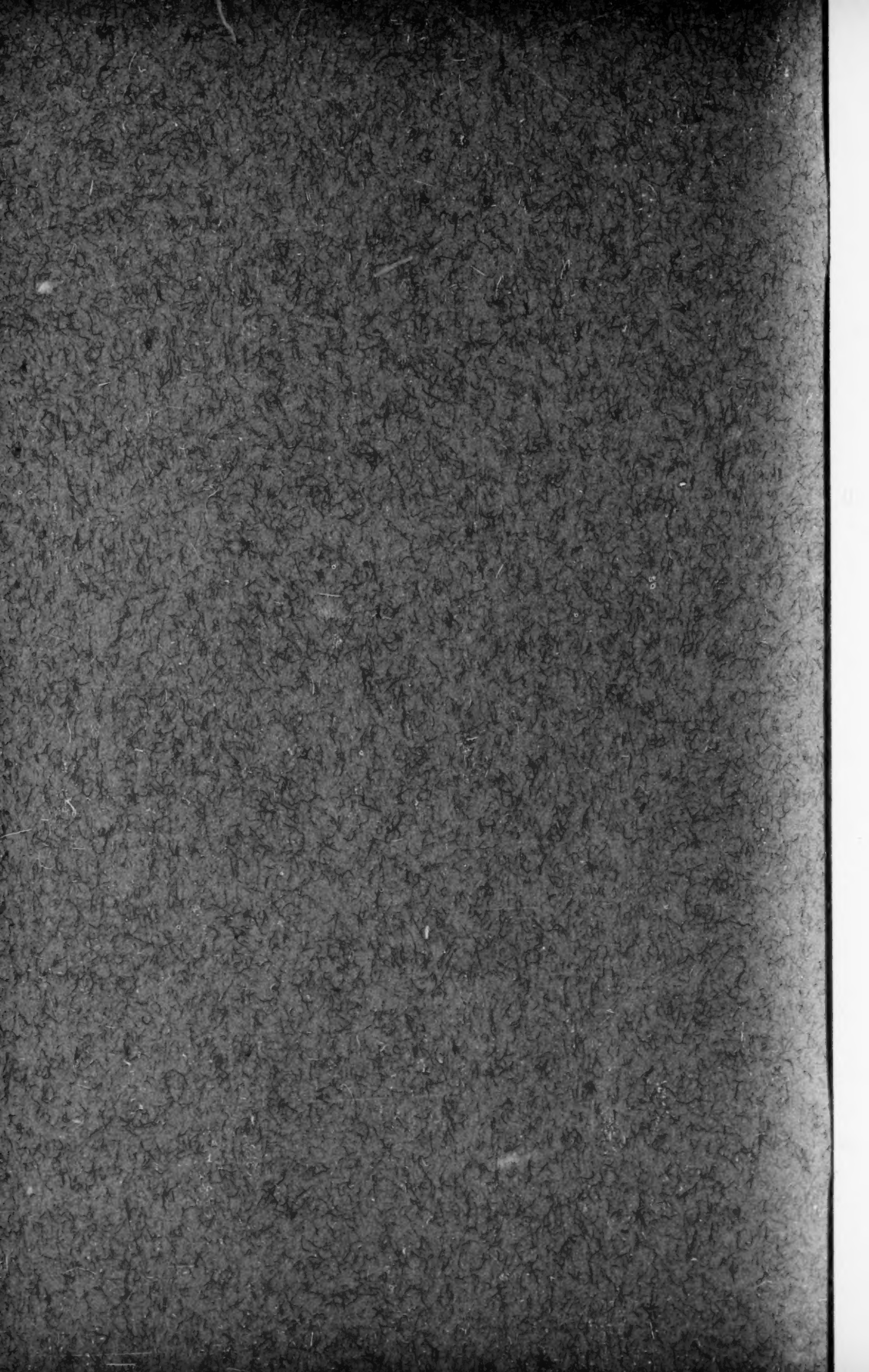
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QUESTION PRESENTED

Whether petitioner may take an interlocutory appeal from an order vacating the United States Army Corps of Engineers' denial of a fill permit under Section 404 of the Clean Water Act, 33 U.S.C. 1344, and Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, and remanding the case to the Corps of Engineers for further proceedings.

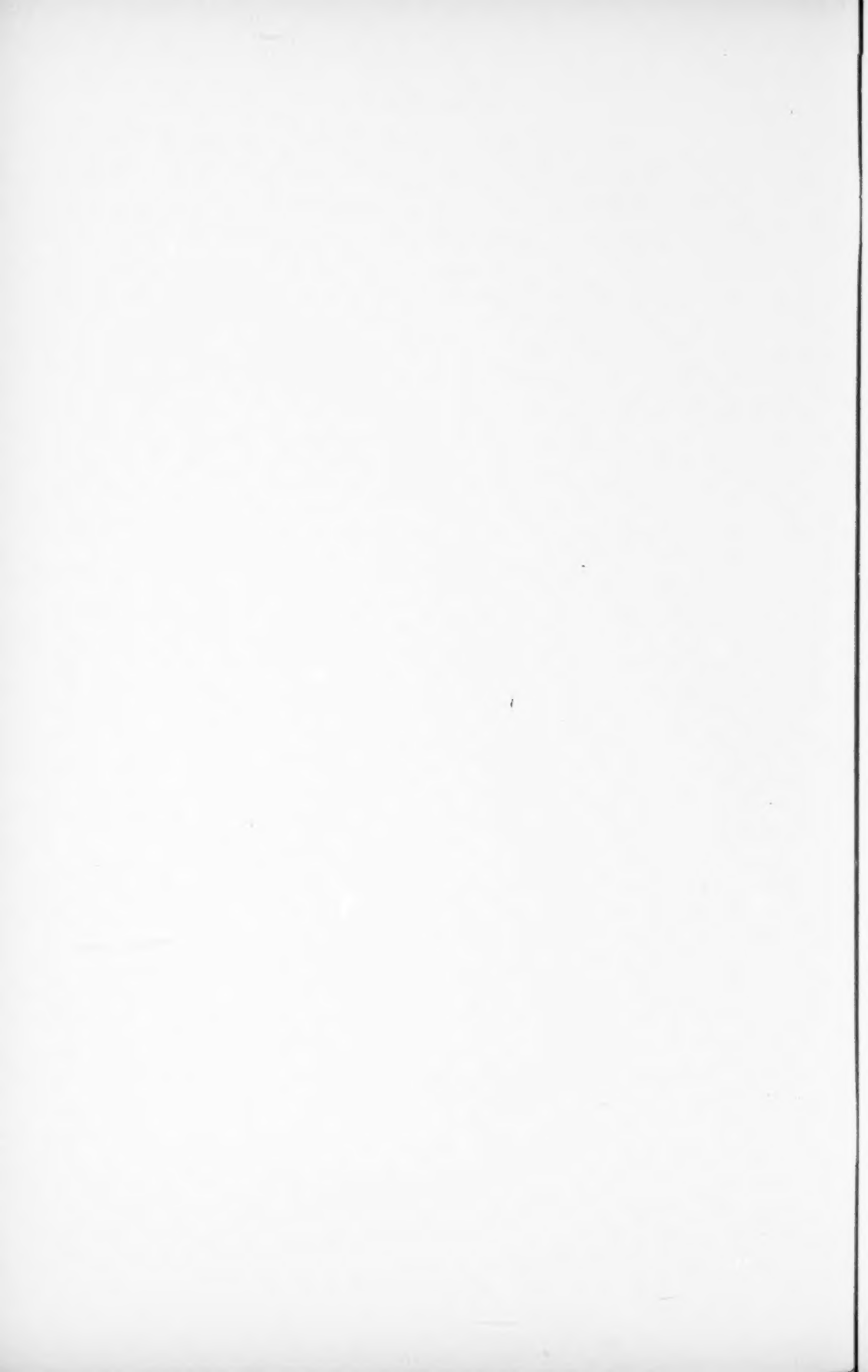


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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-23a) is reported at 841 F.2d 440. The opinion of the district court (Pet. App. 25a-84a) is reported at 672 F.Supp. 561.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24a) was entered on March 11, 1988. The petition for rehearing and suggestion for rehearing en banc were denied on April 7, 1988 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on July 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Mall Properties, Inc. (Mall Properties), a developer of shopping malls, "for many years has sought to develop a shopping mall in the Town of North Haven, Connecti-

cut" (Pet. App. 26a). Mall Properties proposed to build its project, a two-story shopping mall containing 1.1 million square feet, on a site along the eastern bank of the Quinnipiac River, roughly eight miles north of the City of New Haven (*id.* at 105a-108a). The project involved the filling of certain wetlands and open water. Accordingly, in November 1979, Mall Properties applied to the United States Army Corps of Engineers, under Section 404 of the Clean Water Act, 33 U.S.C. 1344, and Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, for a permit to fill those areas (Pet. App. 5a, 27a, 120a). Petitioner, the City of New Haven, vigorously opposed the proposed shopping mall on both environmental and economic grounds. Petitioner "claims that a North Haven mall will jeopardize the fragile economy of New Haven, which all levels of government have long been seeking to revitalize" (*id.* at 28a).

On August 20, 1985, the Corps of Engineers issued its "Record of Decision" denying Mall Properties' application for the permit (Pet. App. 104a-272a).¹ In determining that the application was "contrary to the public interest," the Corps of Engineers found that the project would have "troublesome" impacts on flooding and would cause a "net loss in wetland resources" (*id.* at 270a, 272a). Moreover, "weighing most heavily * * * [was the] concern for the socio-economic impacts this project would have on the

¹ Apart from conducting public hearings and soliciting comments from interested parties, including various state and federal agencies, the Corps of Engineers prepared and considered an Environmental Impact Statement.

Colonel Carl B. Sciple, acting under the authority delegated by the Secretary of the Army and the Chief of Engineers, was responsible for reviewing Mall Properties' application (see 33 C.F.R. 325.8). Pet. App. 102a-103a.

City of New Haven" (*id.* at 270a).² Finally, the Corps of Engineers considered the opposition of the Governor of Connecticut, who in a July 1985 meeting with Colonel Sciple, "indicated that he felt it was not worth the risk to New Haven of building the North Haven mall" (*id.* at 272a).

2. On October 29, 1985, Mall Properties filed a complaint against the Secretary of the Army and the Corps of Engineers in the United States District Court for the District of Massachusetts. The complaint principally contended that the Corps of Engineers had exceeded its statutory authority in basing its decision on the project's impact on New Haven's economy and had violated its regulations by considering the Governor of Connecticut's opposition to the project without first giving Mall Proper-

² The Record of Decision explained (Pet. App. 259a-261a):

It is evident by visiting New Haven today, that an active, balanced retail core is one of the cornerstones of the city's development program and of downtown New Haven's future as a regional center. The city feels that the public-private partnership upon which the development program is built is strong and based upon a confidence in continued success of their overall economic development effort. Though this partnership program may be strong, the confidence upon which it is based is fragile, such that construction of the mall would seriously undermine the major retail element of their revitalization program. The spin-offs would extend beyond the potential store closings, it would effect [*sic*] the basic confidence in the future quality, vitality, and diversity of the downtown area affecting investments in housing, office and entertainment projects.

* * * * *

* * * It appears that New Haven's social and economic well being is tied directly to a viable retail environment reflecting a balanced racial and economic mix. The construction of the mall would disrupt this balance.

* * * * *

ties an opportunity to respond.³ Mall Properties sought an order vacating the order denying its permit. Pet. App. 6a-7a, 33a-34a.⁴ Petitioner, under Fed. R. Civ. P. 24(a), moved to intervene as a defendant in the lawsuit; the district court granted the motion on May 12, 1986 (Pet. App. 85a-92a).

On cross-motions for summary judgment, the district court vacated the Corps of Engineers' denial of the permit and remanded the case for a reconsideration of Mall Properties' application (Pet. App. 25a-84a). The court concluded that "because the Corps gave significant weight to economic factors not related to changes in the physical environment in this case, its decision was not in accordance with Section 404 and Section 10" (*id.* at 63a-64a). The court also held that the Corps of Engineers had violated 33 C.F.R. 325.2(a)(3) by considering the comments of the

³ The applicable regulation, 33 C.F.R. 325.2(a)(3) (1986), provided in pertinent part:

At the earliest practicable time, the applicant must be given the opportunity to furnish the district engineer his proposed resolution or rebuttal to all objections from other Government agencies and other substantive adverse comments before final decision will be made on the application.

That regulation has recently been amended and currently provides:

If the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish his views on such issue to the district engineer * * *. At the earliest practicable time other substantive comments will be furnished to the applicant for his information and any views he may wish to offer.

Given the facts found by the district court, we doubt that the court would have reached a contrary result under the current regulation.

⁴ Mall Properties had abandoned its effort to seek an order requiring the Corps of Engineers to issue the permit (Pet. App. 33a).

Governor of Connecticut without first notifying Mall Properties (Pet. App. 83a). The court therefore remanded the case to the Corps for reconsideration.

On September 14, 1987, petitioner filed a notice of appeal. The federal respondents, who had not filed a notice of appeal, moved to dismiss the appeal as interlocutory under 28 U.S.C. 1291. Mall Properties joined the federal respondents' motion. Pet. App. 5a.

3. The court of appeals dismissed petitioner's appeal, holding that the district court's order remanding the case to the Corps of Engineers was not a "final, immediately appealable order[]" (Pet. App. 10a). Relying on the general rule that orders remanding cases to administrative agencies are not immediately appealable under 28 U.S.C. 1291, the court of appeals stated that the district court's order "is but one interim step in the process towards [Mall Properties] obtaining its ultimate goal," namely, the fill permit, and thus "the remand order [did not] meet[] the traditional definition of a final judgment, that is, one which 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment' " (Pet. App. 8a (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945))).

The court of appeals rejected petitioner's attempt to invoke the exception to the general rule that permits an appeal from an order remanding to an agency where effective review would be foreclosed without an immediate appeal. See, e.g., *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984). Effective appellate review of petitioner's claims remained available (Pet. App. 18a-19a (footnote omitted)):

If, after remand, the permits are granted, the City can seek judicial review and if the district court upholds the grant, the City can appeal to this court and both argue that the original permit denial based on New

Haven's socio-economic developmental interests was proper and present any other challenges arising from the remand proceedings it may have. Thus, review of the socio-economic issue the City now wants to present, is not denied; it is simply delayed.

For this reason, the court of appeals also concluded that the remand order was not appealable under the collateral order doctrine (*id.* at 19a).⁵

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Moreover, any delay in appellate review will not prejudice the City of New Haven because the project it opposes cannot be built until and unless the Corps of Engineers grants a permit. Accordingly, review by this Court is not warranted.

Petitioner apparently contends (Pet. 23-38) that under "a 'practical * * * construction' " (Pet. 29) of the final judgment rule of 28 U.S.C. 1291, the district court's order was appealable where "the resolution of the legal issues in this case are [*sic*] of fundamental importance to the entire metropolitan region" (Pet. 38). In enacting Section 1291,

⁵ The court of appeals also observed that "allowance of an immediate appeal would violate the efficiency concerns behind the policy against piecemeal appeals" (Pet. App. 20a). The court recognized the possibility that an immediate appeal resulting in a reversal of the district court's order would avoid conducting "an unnecessary administrative proceeding" (*id.* at 21a). The court observed (*id.* at 22a), however, that

reach[ing] out to decide the merits of an [erroneous] interlocutory order just because reversal of an erroneous interlocutory ruling would expedite a particular litigants' case would, in the long run, undermine the final judgment rule and open the door to piecemeal litigation and its concomitant delay, costs, and burdens.

Congress determined that in most cases⁶ the concerns of a litigant seeking immediate appellate review are not sufficiently compelling to outweigh the importance of conserving judicial resources and avoiding piecemeal appellate review (with its potential for greatly protracting final resolution of a case). See, e.g., *United States v. Nixon*, 418 U.S. 683, 690 (1974); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974) (final judgment rule prevents the "debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy").

Accordingly, courts have adhered to the general rule that orders remanding reviewed actions to an administrative agency for further proceedings are not final appealable orders.⁷ This rule is sound:

The case remains alive, and it seems highly unlikely that the order of remand will rest on matters that are genuinely collateral to the merits of the underlying dispute. Effective review of the claim that the original administrative result was not proper can be had after the further proceedings have been completed.

⁶ A substantial safety valve has been provided in 28 U.S.C. 1292(a) and (b).

⁷ See, e.g., *Memorial Hospital Sys. v. Heckler*, 769 F.2d 1043, 1044 (5th Cir. 1985); *Farr v. Heckler*, 729 F.2d 1426, 1427 (11th Cir. 1984) (per curiam); *McCoy v. Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1982) (en banc); *Loffland Bros. v. Rougeau*, 655 F.2d 1031, 1032 (10th Cir. 1981) (per curiam); *Gilcrist v. Schweiker*, 645 F.2d 818, 818-819 (9th Cir. 1981) (per curiam); *Director, Office of Workers' Compensation Programs v. Brodka*, 643 F.2d 159, 161-163 (3d Cir. 1981); *Dalto v. Richardson*, 434 F.2d 1018, 1019 (2d Cir. 1970) (per curiam), cert. denied, 401 U.S. 979 (1971); *Bohms v. Gardner*, 381 F.2d 283, 285 (8th Cir. 1967) (Blackmun, J.), cert. denied, 390 U.S. 964 (1968).

15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3914, at 552 (1st ed. 1976). In this case, therefore, the court of appeals correctly followed settled law in dismissing petitioner's appeal as interlocutory.

To be sure, courts have carved out an exception to the general rule prohibiting immediate appealability. Where effective appellate review would be unavailable after remand, courts have permitted immediate appeals "in order to preserve appellate review of issues that might otherwise escape review" (15 C. Wright, A. Miller & E. Cooper, *supra*, § 3914, at 551 (footnote omitted)); see, e.g., *Bender v. Clark*, *supra*. Petitioner's appeal, however, does not qualify for this exception.⁸ As the court of appeals correctly pointed out (Pet. App. 17a-18a), the issue petitioner seeks to litigate, whether the Corps of Engineers may consider the City of New Haven's socio-economic interests, remains subject to effective judicial review after the remand for further administrative proceedings.⁹

It is, consequently, premature for petitioner to seek this Court's review (Pet. 39-48) of whether the district court erred in concluding that the Corps of Engineers should not have considered the socio-economic consequences of the proposed project. This Court has no authority to review a question that was not within the jurisdiction of, and was not decided by, the court of appeals. See *Nixon v. Fitzgerald*, 457 U.S. 731, 741-743 (1982).

⁸ It is, accordingly, immaterial for present purposes whether, as petitioner seems to contend (Pet. 48-51), the government could have appealed. See Pet. App. 13a-17a. A party retains the option of awaiting a final judgment before seeking appellate review regardless of whether interlocutory review would have been available.

⁹ For the same reason, petitioner may not appeal the district court's order under the collateral order doctrine. See *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949) (order must be effectively unreviewable on appeal from a final judgment); Pet. App. 11a-12a.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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AUGUST 1988